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TEXAS VENUE: THE PATHOLOGY OF THE LAW

by

Garey B. Spradley*

TEXAS civil trial procedure is the product of the state's Spanish civil law heritage¹ and a desire by early Texas lawmakers to avoid the complexities of a common law system of jurisprudence.² This pioneer spirit of independence led Texans to adopt the simpler Spanish forms of initiating civil actions by petition and answer³ and allowing liberal amendments to pleadings.⁴ Texans also rejected the bifurcated system of law and equity courts, a holdover legal structure from the medieval English court system.⁵ In 1840 Texas adopted only so much of the common law of England as was "not inconsistent with the Constitution or the Acts of Congress now in force."⁶ Early Texas courts also held that common law procedures were not obligatory if in conflict with Texas procedure.⁷ The early Texans thus made a conscious choice of the Spanish civil law system in a variety of procedural areas, preferring simplicity and expediency in civil practices. Those founding Texas fathers would be astonished by the complexity of our modern Texas venue practice. The Texas system for determining the proper location of a civil trial as it exists today has produced endless pages of case law,⁸ excessive costs, and consistent delays in reaching the trial on the merits of any particular case.

The venue issue is raised in Texas when the defendant files a plea of privilege, asserting that the venue alleged by the plaintiff in the original

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1. McKnight, *The Spanish Influence on the Texas Law of Civil Procedure*, 38 TEXAS L. REV. 24 (1959).

2. McCormick, *The Revival of the Pioneer Spirit in Texas Procedure*, 18 TEXAS L. REV. 426 (1940).

3. *Id.* at 427-28.

4. *Id.* at 429.

5. *Id.* at 428; Markham, *The Reception of the Common Law of England in Texas and the Judicial Attitude Toward that Reception*, 29 TEXAS L. REV. 904, 909-10 (1951).

6. Hall, *An Account of the Adoption of the Common Law by Texas*, 28 TEXAS L. REV. 801, 808 (1950) (quoting 1840 Tex. Gen. Laws, An Act to Adopt the Common Law of England,—to repeal certain Mexican Laws, and to regulate the Marital Rights of the parties, 2 H. GAMMEL, LAWS OF TEXAS 177-78 (1898)).

7. *Grassmeyer v. Beeson*, 13 Tex. 524, 531 (1855); see also *Texas v. Smith*, Dallam 407 (1841); *Fowler v. Poor*, Dallam 401 (1841); Hall, *supra* note 6, at 812-13.

8. See 37A TEX. DIG. *Venue* (1952 & Supp. 1981) (containing over 400 pages of annotations of cases dealing with venue matters).

petition is improper.⁹ The plaintiff must then file a controverting affidavit and secure a hearing on the venue issue.¹⁰ The plaintiff has the burden of proof at the venue hearing to demonstrate that the forum county is the proper venue; otherwise the defendant's plea will be granted and the case transferred to the county of the defendant's residence.¹¹ The venue decision is an appealable interlocutory order,¹² and trial on the merits of the case may be delayed pending appeal.¹³

The Texas venue statute is organized in a seemingly simple manner; a general rule is qualified by a series of specific exceptions.¹⁴ The general rule in venue matters is that "[n]o person who is an inhabitant of this State shall be sued out of the county in which he has his domicile except in the following cases."¹⁵ That general rule is then diluted by thirty-four specific exceptions.¹⁶ Because the general rule is designed to protect the defendant, the numerous exceptions can be viewed as either providing some benefit to the plaintiff¹⁷ or providing assistance in the administration of justice.¹⁸

This Article discusses the history and development of the Texas venue system, criticizes the confused evolution of that system, and examines more efficient and practical venue systems of other jurisdictions. In an attempt to bring simplicity and fairness to Texas procedural law, this Article proposes a series of modifications to the current venue system. This Article concludes that the trial on the merits is of primary importance; consequently, the question of venue should be simplified in order to relegate it to its proper secondary position.

I. HISTORY, DEVELOPMENT, AND CRITICISM OF THE TEXAS VENUE SYSTEM

Article 1995: The General Rule

Texas's first venue statute, passed in 1836,¹⁹ was taken from the Spanish

9. TEX. R. CIV. P. 86.

10. *Id.* 87. The plaintiff can, of course, concede the defendant is correct as to venue and request the case be transferred to the county of the defendant's residence.

11. *Id.* 86-89; *see* *General Motors Corp., Pontiac Motor Div. v. Courtesy Pontiac, Inc.*, 538 S.W.2d 3, 6 (Tex. Civ. App.—Tyler 1976, no writ); *Citizens Standard Life Ins. Co. v. Gilley*, 521 S.W.2d 354, 356 (Tex. Civ. App.—Dallas 1975, no writ); *Fleetwood Constr. Co. v. Western Steel Co.*, 510 S.W.2d 161, 163 (Tex. Civ. App.—Corpus Christi 1974, no writ).

12. TEX. REV. CIV. STAT. ANN. art. 2008 (Vernon 1964); *see also* TEX. R. CIV. P. 385(e).

13. TEX. REV. CIV. STAT. ANN. art. 2008 (Vernon 1964); *see also* TEX. R. CIV. P. 385(e).

14. TEX. REV. CIV. STAT. ANN. art. 1995 (Vernon 1964 & Supp. 1982).

15. *Id.*

16. There are 31 numbered exceptions to the general rule, but because of exception subparts, there are a total of 34 actual exceptions. *See, e.g., id.* art. 1995(5)(a)-(b), (9a), (29a) (Vernon Supp. 1982) (multiple provisions under one numbered exception).

17. *See, e.g., id.* art. 1995(9a) (plaintiff may bring suit in county where defendant's negligent act occurred).

18. *See, e.g., id.* art. 1995(19) (Vernon 1964) (suits against counties must be heard in the defendant county).

19. 1836 Tex. Gen. Laws, An Act Establishing the jurisdiction and powers of the District Courts [hereinafter cited as 1836 Tex. Gen. Laws], 1 H. GAMMEL, LAWS OF TEXAS 1258 (1898).

medieval code *Las Siete Partidas*,²⁰ the Spanish law first codified in the year 1265.²¹ Seven of the exceptions in the Texas statute of 1836 can be traced directly to the *Partidas*.²² Thus the basic outline and governing principles of Texas venue law, a general rule and accompanying exceptions, were derived from a medieval Spanish code. Though many exceptions have been added to our derivation of the original Spanish venue law, the basic structure remains intact. "[T]he dominant purpose of the venue statutes is to give a person who has been sued the right to defend such suit in the county of his domicile . . ." ²³ The size of the State of Texas and the difficulty of early day transportation engendered a concern that the defendant might be coerced into an unjust settlement.²⁴ Modern transportation and communication have lessened the urgency of this concern.²⁵ More importantly, the basic venue provision favoring the defendant ignores important factors that should be given equal consideration, such as the convenience of witnesses and the location of the subject of the action.²⁶ Similar concerns have been the basis for enactment of many of the exceptions to the basic venue rule.²⁷ The basic rule favoring the defendant's residence has, however, served to give the defendant a clear advantage at the venue hearing.²⁸

An examination of legislative history and case law interpreting the exceptions indicates two primary motives behind the enactment of the exceptions. First and foremost, many of the exceptions benefit certain classes of injured plaintiffs by granting an alternative venue in specific circumstances.²⁹ Secondly, many of the exceptions were drafted for the administrative convenience of the courts or the government.³⁰ These motives serve laudable purposes, but problems lie in the unnecessary complexity produced by "piecemeal legislative tinkering"³¹ during more than 140 years.³²

The current Texas venue statute, article 1995 of the Texas Revised Civil

20. 2 G. LOPEZ ed., *LAS SIETE PARTIDAS* III.2.32 (Valencia 1767).

21. McKnight, *supra* note 1, at 28.

22. *Id.* at 37-40. Professor McKnight notes the similarity in the language and the order of the venue exceptions in the *Partidas* compared to the Texas statute. *Id.*

23. *City of Mineral Wells v. McDonald*, 141 Tex. 113, 116, 170 S.W.2d 466, 468 (1943).

24. Harvill, *Venue in Texas: A New Approach to Proof of Venue Facts*, 30 TEX. B.J. 429, 429-30 (1967); Langley, *A Suggested Revision of the Texas Venue Statute*, 30 TEXAS L. REV. 547 (1952).

25. Langley, *supra* note 24, at 547.

26. *Id.* at 548.

27. Harvill, *supra* note 24, at 430.

28. Langley, *supra* note 24, at 550.

29. *See, e.g.*, TEX. REV. CIV. STAT. ANN. art. 1995(5) (contracts), (9a) (negligence), (31) (breach of warranty) (Vernon Supp. 1982); *see also* the general principle, expressed by the court in *Finch's Heirs v. Edmonson*, 9 Tex. 504, 510 (1853): "[E]xceptions in the statute are all intended for the benefit of the plaintiff . . ."

30. *See, e.g.*, TEX. REV. CIV. STAT. ANN. art. 1995(6) (suits against executors), (17) (suits for injunctions) (Vernon 1964 & Supp. 1982).

31. Stevens, *Venue Statutes: Diagnosis and Proposed Cure*, 49 MICH. L. REV. 307, 307 (1951).

32. *Compare* TEX. REV. CIV. STAT. ANN. art. 1995 (Vernon 1964 & Supp. 1982) (31 numbered exceptions) *with* 1836 Tex. Gen. Laws, *supra* note 19, 1 H. GAMMEL, LAWS OF TEXAS 1258, 1260 (1898) (original Texas venue statute containing 10 numbered exceptions).

Statutes, establishes the rule that no person who is an inhabitant of Texas will be sued outside the county of his domicile except under specific circumstances.³³ Because of this structure, based more upon the exception than the rule, the Texas venue statute has been criticized for a variety of reasons. Initially, the statute lacks certainty of interpretation and clarity of application.³⁴ These problems are reflected in the number of appellate cases dealing with venue matters, occupying more than six hundred pages of annotations in the Texas statutes.³⁵ Part of the reason for the number of appellate cases is the statute's use of undefined terms. Terms are given different interpretations for venue purposes than for purposes of a trial on the merits or other proceedings.³⁶ An example of this variance is found in the basic venue provision that uses the term "domicile" of the defendant. The Texas Supreme Court has held that "domicile" as used by the venue statute is synonymous with "residence."³⁷ The court, in defining the usual legal concept of "domicile," noted that "there [can] be but one domicile and several residences," but for venue purposes Texas courts should construe the two terms to be synonymous.³⁸ Other examples of the differing interpretations given to legal terms for venue purposes can be seen in the venue exceptions dealing with contracts³⁹ and with corporations.⁴⁰ Because of the statute's use of ordinary phraseology and the legal community's refusal to define these venue terms consistently, constant venue litigation has ensued. The result has been uncertainty in application of the venue statute, a trap for the unwary attorney, and an increase in venue appeals.

Another criticism of article 1995 involves the requirement in some of the exceptions that the plaintiff prove that he has a valid cause of action against the defendant.⁴¹ If the plaintiff fails to prove that a cause of action exists in the plea of privilege hearing, then the plaintiff's allegation of venue cannot be maintained under the exception. The plaintiff must prove a cause of action as one of the required venue facts under any exception that contains the words "cause of action."⁴² This requirement causes delay of the trial on the merits while the parties expend their energies in preparation for the venue hearing and forces the plaintiff to put on full-scale proof of the cause of action to maintain venue. The plaintiff may thus face two trials before a decision can be reached on the merits of his claim. This

33. TEX. REV. CIV. STAT. ANN. art. 1995 (Vernon 1964 & Supp. 1982).

34. Langley, *supra* note 24, at 548.

35. TEX. REV. CIV. STAT. ANN. art. 1995 (Vernon 1964 & Supp. 1982).

36. B. MCELROY, TEXAS PRACTICE—CIVIL PRE-TRIAL PROCEDURE, § 694, at 493 (1980).

37. Snyder v. Pitts, 150 Tex. 407, 412, 241 S.W.2d 136, 139 (1951).

38. *Id.* at 411, 241 S.W.2d at 138 (citing Brown v. Boulden, 18 Tex. 431 (1857)).

39. TEX. REV. CIV. STAT. ANN. art. 1995(5)(a), (5)(b) (Vernon Supp. 1982).

40. *Id.* art. 1995(23), (27) (Vernon 1964).

41. *See, e.g.*, the recent plethora of cases annotated in *id.* art. 1995 (Vernon Supp. 1982).

42. A.H. Belo Corp. v. Blanton, 133 Tex. 391, 129 S.W.2d 619 (1939). The requirement that plaintiff must establish a cause of action prior to falling under a venue exception is also applicable to subdivision 4. *See* Stockyards Nat'l Bank v. Maples, 127 Tex. 633, 95 S.W.2d 1300 (1936).

troublesome requirement was the product of the 1917 legislature's concern about the onerous burdens the plea of privilege practice placed on the defendant at that time.⁴³ In enacting reform legislation to lessen this burden,⁴⁴ the legislature required the plaintiff to file a controverting plea "setting out specifically the fact or facts relied upon to confer venue . . . on the court where the cause is pending."⁴⁵ This language, coupled with prior judicial precedent,⁴⁶ led a later court to authorize this Texas two-trial system in civil procedure:

It is true that this construction of the statute [art. 2007] means that the issue as to the commission of the crime or offense may be twice tried, once in the hearing of the plea of privilege and once in the trial on the merits, with added expense and delay and sometimes with inconsistent results. . . . It is better to put the parties to the inconvenience of two trials of the issue than to deprive the defendant of the valuable privilege of making his defense on the merits in the county of his residence, when the facts to bring the case within the exception do not actually exist.⁴⁷

Conditions forty-five years ago may have allowed the luxury of spending a court's time and a litigant's money in what could amount to a full-blown trial to decide the most convenient place to hold the real trial on the merits. But Texans in the 1980s cannot afford to retain this outdated, expensive, and time-consuming system.

The requirement that the plaintiff prove a cause of action is determined by the substantive law. This means that substantive law questions, sometimes novel ones, will be decided in venue appeals. Such questions should instead be decided in the appeal on the merits where the record has been more fully developed. Historically, substantive law decisions made in venue appeals have been based upon incomplete records and briefs containing only a superficial analysis of the questions involved.⁴⁸ Decisions based upon such tenuous lower court development cannot be a proper foundation for the evolution of stable judicial precedent.

Chief Justice Greenhill of the Texas Supreme Court cited the problems of delay to litigants and the congestion of the court dockets caused by the venue statute in his State of the Judiciary Speech to the 66th Legislature in 1979.⁴⁹ Calling the system a "gross extravagance" of time and resources, Chief Justice Greenhill described the two-trial problem:

Where venue is contested, and it often is, the first trial is to determine *where* the case is to be tried, i.e., whether the plaintiff can

43. See the discussion of the history and development of the Texas venue system, *infra* notes 394-437 and accompanying text.

44. 1917 Tex. Gen. Laws, ch. 176, § 1, at 388. In 1925 this act was codified as Tex. Rev. Civ. Stat. art. 2007 (1925).

45. 1917 Tex. Gen. Laws, ch. 176, § 1, at 388.

46. See *Hilliard v. Wilson*, 76 Tex. 180, 13 S.W. 25 (1890).

47. *Compton v. Elliott*, 126 Tex. 232, 240-41, 88 S.W.2d 91, 95 (1935).

48. See Guittard & Tyler, *Revision of the Texas Venue Statute: A Reform Long Overdue*, 32 BAYLOR L. REV. 563, 568 (1980).

49. Greenhill, *State of the Judiciary*, 42 TEX. B.J. 379, 383 (1979).

prove by a preponderance of the evidence that the defendant was at fault in a particular county. The result of that trial is appealable. After some two years, that matter . . . is finally settled. Then the parties go back and try the case to a second court and jury and the appeal starts over again.

The right of a person to be sued in his or her home county is an important one. But like other matters, the proof, or establishment, of that right, and related venue procedures, have gotten out of hand. We need your help to remove this large volume of cases of venue from our dockets and to speed to adjudication of cases.⁵⁰

As the venue appeal is interlocutory, consideration of the case on the merits halts until the venue appeal is decided. This system indicates the misplaced importance that Texas judges and legislators have placed upon venue matters. One answer to this procedural logjam is for the Texas Legislature to repeal the provision allowing interlocutory appeal of the venue decision.⁵¹ The supreme court could then consider rules of civil procedure which would eliminate this costly procedural step.

The present venue statute also encourages the fragmentation of a single law suit into multiple law suits in several counties when one or more pleas of privilege are sustained.⁵² Under present law the only time that an entire case involving defendants with different county domiciles can be transferred to a single county is when the cause of action is a joint action growing out of a joint liability. That is, only when the defendants are necessary parties can an entire case with defendants of differing residences be consolidated into a single county.⁵³ As necessary defendant parties are rare, fragmentation is encouraged.⁵⁴ Another way that fragmentation results is through the application of article 1995(29a). Any time a plaintiff files suit in a county in which no defendant resides, the plaintiff must use article 1995(29a) and the concept of necessary party to sustain venue against all defendants in that county. Again, as necessary parties are rare, a plaintiff has difficulty maintaining venue in such a situation. In *Loop Cold Storage Co. v. South Texas Packers, Inc.*,⁵⁵ for example, the plaintiff attempted to maintain a suit against two warehouses for damages to frozen beef. The defendant warehouses each had a domicile in a different county. One of the warehouses negligently allowed some meat to thaw, the thawed meat becoming valueless. The plaintiff did not know which warehouse was negligent. Since the two warehouses were not necessary parties, the plaintiff

50. *Id.*

51. TEX. REV. CIV. STAT. ANN. art. 2008 (Vernon 1964). See the discussion of the history and development of the Texas venue system, *infra* notes 394-437 and accompanying text.

52. Guittard & Tyler, *supra* note 48, at 578.

53. See *Geophysical Data Processing Center, Inc. v. Cruz*, 576 S.W.2d 666, 668-69 (Tex. Civ. App.—Beaumont 1978, no writ).

54. Consequently, in a case involving multiple defendants with differing county residences, venue can easily become a tool whereby the various defendants force the plaintiff to try a lawsuit repeatedly. Moreover, this fragmentation poses difficult problems of res judicata and collateral estoppel that might not exist if fragmentation were discouraged.

55. 491 S.W.2d 106 (Tex. 1973).

ended up with two suits in two different counties. It would be nearly impossible for a plaintiff to prevail on the merits in such a situation.⁵⁶ Another criticism of the venue statute is that subdivisions 4 and 29a sometimes require a plaintiff to sue someone who might not otherwise be sued in order to hold venue against another defendant.⁵⁷ For instance, under subdivision 4 a plaintiff would have to sue a resident defendant in order to maintain venue against a nonresident defendant.

The present venue statute can also be criticized because it does not fully accomplish its primary purpose of protecting the defendant's venue rights. While the purported goal of the venue statute is to prevent forcing a defendant to travel great distances to be litigated against, the fact that the defendant must travel to the place where the plaintiff initially files the cause of action to contest venue negates achievement of this goal.⁵⁸

Criticisms of doubtful validity have also been asserted against the present venue statute. First, because so many venue appeals involve questions of substantive law, the decision of the trial and appellate judges will "inevitably influence the course of the litigation on the merits and usually the settlement negotiations of the parties as well."⁵⁹ This argument lacks validity for two reasons. Initially, it seems advantageous that the parties be faced with the applicable law as soon as possible. This would allow them to settle their case knowledgeably in light of the trial judge's rulings on substantive law. Moreover, the fact that a venue decision may influence litigation strategy and settlement negotiations must be accepted as inherent in any system that allows a defendant to contest a plaintiff's allegation of proper venue.⁶⁰

The second argument criticizes the venue statute's use of terms such as "fraud" or "negligence" because these are terms incapable of precise definition.⁶¹ This argument also raises other serious questions. If the argument has any validity, then these terms should be deleted from the substantive law as well. Additionally, due to the very nature of language itself, a statute could not be framed without the use of some "broad terms incapable of precise determination."⁶² The problem here is not whether broad terms should be used, but whether a venue distinction based upon varying causes of action is needed. In other words, does venue really need to be different in a negligence case than it is in a fraud case? If not, the problem can be corrected by abolishing whatever venue distinctions may

56. Fragmentation can also occur in third-party actions. See Guittard & Tyler, *supra* note 48, at 578-79.

57. *Id.* at 580-81.

58. *Id.* at 567.

59. *Id.* at 568; see *Loop Cold Storage Co. v. South Tex. Packers, Inc.*, 491 S.W.2d 106, 109 (Tex. 1973).

60. While the author disagrees with the argument that because venue appeals may affect the negotiation, settlement, or trial of a lawsuit they should not be permitted, the author nevertheless agrees that venue appeals should be abolished because substantive law questions should not be adjudicated in venue appeals.

61. Guittard & Tyler, *supra* note 48, at 568-69.

62. *Id.* at 571.

be made based upon these various bases of liability, rather than by deleting the broad terms themselves.

*Article 1995(1): Married Woman*⁶³

Article 1995(1) originally provided an exception to the general venue rule by stating that a married woman could be sued in the county of her husband's domicile rather than in the county of her own domicile. This subdivision's origins are found in the Spanish law.⁶⁴ Despite the medieval character inherent in its discrimination against married women, this exception remained a part of the statute until 1967, when it was repealed by the legislature.⁶⁵

*Article 1995(2): Transient Persons*⁶⁶

Subdivision 2 allows a suit to be maintained against a transient person in any county where that person may be found. Subdivision 2 was also adopted from Spanish law.⁶⁷ Its original purpose was to favor Texas plaintiffs by allowing a suit to be maintained wherever the transient could be located. Early judicial comments on this exception indicate that it is inherently a jurisdictional provision, since its goal is to provide a forum for trial in any location where the transient can be served with process.⁶⁸

For this exception to apply, the burden is upon the plaintiff to prove that the defendant is a transient person and to serve the defendant in the county in which venue is alleged. A transient person is defined as "one who is found in the state but has no fixed place of residence therein."⁶⁹ The transient exception confers no actual benefit on the plaintiff if the defendant is truly transient. The plaintiff would be better served by an exception allowing suit to be filed and maintained in any proper venue

63. 1967 Tex. Gen. Laws, ch. 419, § 1, at 951; see 1 R. McDONALD, TEXAS CIVIL PRACTICE IN DISTRICT AND COUNTY COURTS § 407 (rev. ed. 1965 & Supp. 1980); B. McELROY, *supra* note 36, § 670; Keith, *Venue in Civil Cases*, 1 STATE BAR OF TEXAS ADVANCED CIVIL TRIAL COURSE HANDBOOK J-16 (1978 & Supp. 1979).

64. 1836 Tex. Gen. Laws, *supra* note 19, 1 H. GAMMEL, LAWS OF TEXAS 1258, 1260 (1898).

65. 1967 Tex. Gen. Laws, ch. 419, § 1, at 951.

66. TEX. REV. CIV. STAT. ANN. art. 1995(2) (Vernon 1964); see 1 R. McDONALD, *supra* note 63, § 4.08; B. McELROY, *supra* note 36, § 671; Keith, *supra* note 63, at J-16.

67. 1836 Tex. Gen. Laws, *supra* note 19, 1 H. GAMMEL, LAWS OF TEXAS 1258, 1260 (1898).

68. See *McMullen v. Guest*, 6 Tex. 275, 279 (1851). In *McMullen* the court stated: The plaintiff is a resident of the State, and is entitled to the process of the court to protect and enforce his legal rights against a non-resident whose person or property he may find subject to that process. He may sue the non-resident as a "transient person" . . . if found temporarily sojourning here

Id.; see also *Butterworth v. Kinsey*, 14 Tex. 495 (1855).

69. *Bender v. Armstrong*, 59 S.W.2d 451, 453 (Tex. Civ. App.—Waco 1933, no writ). The transient must, however, be an inhabitant of Texas. See also *Loos v. Swaim*, 16 S.W.2d 350 (Tex. Civ. App.—Texarkana 1929, writ dism'd). By definition, if the inhabitant has a fixed place of residence, he cannot be deemed a "transient." 1 R. McDONALD, *supra* note 63, § 4.08.

before locating the defendant.⁷⁰ Moreover, the exception does not benefit the defendant because the defendant has a choice of venue only if he can beat the process server to the county line.⁷¹ Additionally, subdivision 2 is unnecessary because a transient has no place of residence to which suit could be transferred if the plaintiff were to file suit in an improper forum. Consequently, the transient defendant would be unable to avail himself of the plea of privilege motion, the very foundation upon which the defense-oriented protective nature of the venue statute rests.

*Article 1995(3): Texas Nonresidents; Defendants of Unknown Residence*⁷²

Article 1995(3) permits venue to be maintained in the county of the plaintiff's residence "[i]f one or all of several defendants reside without the State or if their residence is unknown."⁷³ Subdivision 3, like subdivision 2, has jurisdictional doctrine as its root purpose. Early courts were concerned that the resident plaintiff would have no jurisdiction, and therefore no proper place for a trial on the merits as well, if service could not be obtained by publication on a nonresident.⁷⁴ The nonresident defendant exception was drafted to preserve the symmetry of the law by providing a proper venue for trial once service could be accomplished by publication.⁷⁵ To maintain venue, the plaintiff must prove that his own residence is within the county of the alleged venue and that the defendant resides outside the state.⁷⁶

Some confusion has occurred regarding judicial interpretation of subdivision 3. The original version of the exception as drafted in 1911⁷⁷ clearly applied the exception only to cases where no resident defendants were involved. The statutory revision of 1925⁷⁸ generated confusion when it included the language quoted above because this language can be interpreted as a joinder provision. That is, a resident defendant would lose

70. Langley, *supra* note 24, at 552.

71. The real difficulty seems to lie in the fact that the plaintiff must actually serve the defendant in the county of alleged venue to establish the validity of this exception. Service of process on a transient is difficult at best.

72. TEX. REV. CIV. STAT. ANN. art. 1995(3) (Vernon 1964); see 1 R. McDONALD, *supra* note 63, § 4.09; B. McELROY, *supra* note 36, § 677; Keith, *supra* note 63, at J-16.

73. TEX. REV. CIV. STAT. ANN. art. 1995(3) (Vernon 1964). Subdivision 3 is not an exception as such to the general venue rule. It merely provides a venue forum for Texas plaintiffs against nonresident defendants. As the general venue rule is designed to protect the Texas defendant, and a defendant in this instance is not a Texas resident, subdivision 3 can be viewed as an addition rather than an exception to the general venue rule.

74. J. TOWNES, PLEADING IN THE DISTRICT AND COUNTY COURTS OF TEXAS 305 (2d ed. 1913).

75. McMullen v. Guest, 6 Tex. 275, 279 (1851). "[A]nd if not to be so found [as a transient], the object of the statute [subdivision 3] under which this suit was brought doubtless was to enable him [resident plaintiff] to sue and obtain service by publication." *Id.*

76. Ladner v. Reliance Corp., 156 Tex. 158, 165-66, 293 S.W.2d 758, 764 (1956); Dalehite v. Smith, 376 S.W.2d 934, 934 (Tex. Civ. App.—San Antonio 1964, no writ); see Keith, *supra* note 63, at J-16. Subdivision 3 is not applicable to a foreign corporation doing business with a permit in Texas. O.M. Franklin Serum Co. v. C.A. Hoover & Sons, 410 S.W.2d 272, 273 (Tex. Civ. App.—Amarillo), writ *ref'd n.r.e.*, 418 S.W.2d 482 (Tex. 1967).

77. Tex. Rev. Civ. Stat. art. 1830(3) (1914).

78. *Id.* art. 1995(3) (1925).

his basic venue privilege if properly joined with a nonresident defendant.⁷⁹ Early decisions rejected the joinder argument for subdivision 3.⁸⁰ The employment of a joinder provision in subdivision 29a,⁸¹ in conjunction with subdivision 3, however, has allowed a plaintiff to maintain suit in the plaintiff's county of residence against a nonresident defendant and a resident necessary party defendant.⁸² For this scheme to be applicable, the resident defendant must be a necessary party.⁸³ This procedural loophole frustrates the intent of subdivision 3,⁸⁴ such frustration being possible under either the statutory revision of 1925 or the current statutory organization of the venue exceptions. This loophole illustrates the problems inherent in piecemeal venue legislation. When the legislature drafted subdivision 29a, the implications for subdivision 3 went unnoticed. Since the nonresident defendant has no standing to file a plea of privilege,⁸⁵ the only practical effect of subdivision 3 is to permit the plaintiff to maintain a suit against the Texas resident in the plaintiff's home county. The preference given to the defendant by the present venue statute should not be subverted by combining the provisions of subdivisions 3 and 29a. One solution would be to limit subdivision 3 to cases where all defendants are nonresidents. This would prevent unfair treatment against Texas resident defendants and further the original intent of subdivision 3.⁸⁶

*Article 1995(4): Defendants in Different Counties*⁸⁷

Subdivision 4 provides that the plaintiff may maintain venue against all properly joinable defendants in any county where any one of the defend-

79. Langley, *supra* note 24, at 533.

80. United States Gas & Oil Co. v. Duffy, 8 S.W.2d 278 (Tex. Civ. App.—Galveston 1928, no writ).

81. Subdivision 29a allows the plaintiff to join all defendants who are necessary parties in a single suit if venue can be maintained against any one of the various defendants. This exception was added in 1927 to abrogate difficulties that had arisen from use of subdivision 4. See *infra* notes 366-81 and accompanying text.

82. Ladner v. Reliance Corp., 156 Tex. 158, 162, 293 S.W.2d 758, 761 (1956).

83. See Pan American Sign Co. v. J.B. Hotel Co., 403 S.W.2d 548, 550 (Tex. Civ. App.—Dallas 1966, no writ).

84. See O.F. Mossberg & Sons v. Sullivan, 591 S.W.2d 952, 955 (Tex. Civ. App.—Austin 1979, no writ). The change in the wording of the statute in 1925 did not reflect a legislative intent to change the meaning of the statute. Langley, *supra* note 24, at 553. Prior to 1925 the statute read that proper venue lies "[w]here the defendant or all of several defendants reside without the state or where the residence of the defendants is unknown, in which case the suit may be brought in the county in which the plaintiff resides." Tex. Rev. Civ. Stat. art. 1830(3) (1914). The statute as it existed prior to 1925 would not have allowed this kind of joinder of a resident defendant. Presumably, the legislature in 1925 did not intend that a resident defendant's venue rights could be defeated by linkage of subdivision 29a with subdivision 3.

85. McMullen v. Burton Auto Springs Corp., 138 S.W.2d 823, 824 (Tex. Civ. App.—Dallas, no writ).

86. Later treatment of subdivision 29a discusses the complexity inherent in the use of the term "necessary party" in establishing venue. See *infra* notes 366-81 and accompanying text.

87. TEX. REV. CIV. STAT. ANN. art. 1995(4) (Vernon 1964); see 1 R. McDONALD, *supra* note 63, § 4.10.2; B. McELROY, *supra* note 36, § 673; Keith, *supra* note 63, at J-17.

ants resides. Texas public policy⁸⁸ has been to avoid a multiplicity of suits by allowing the joinder of resident and nonresident defendants.⁸⁹ The venue facts the plaintiff must plead and prove under subdivision 4 are that: (1) one of the defendants resides in the county of alleged venue;⁹⁰ (2) the plaintiff has a bona fide cause of action against the resident defendant;⁹¹ and (3) the nonresident defendants are at least proper parties to the suit.⁹²

The elements of proving a bona fide cause of action and proper party stature of nonresident defendants were established by the Texas Supreme Court in *Stockyards National Bank v. Maples*.⁹³ While not explicitly required by subdivision 4, these two elements further the purposes of this exception and the general venue scheme; they avoid multiple suits on similar facts and protect the nonresident defendant from being joined with a resident who is not connected to the case. For protection of the nonresident defendant, the courts have required the plaintiff to prove the cause of action in the venue hearing only against the resident defendant.⁹⁴ The court in *Stockyards* rejected the plaintiff's need to prove a cause of action against the nonresident defendant, emphasizing that the nonresident defendant would already have knowledge of the allegations against him.⁹⁵ The court also noted that the proof of other venue facts, such as the proper party status of the nonresident defendant, would adequately protect the nonresident defendant's right to defend himself in his own home county.⁹⁶

88. See 1836 Tex. Gen. Laws, *supra* note 19, 1 H. GAMMEL, LAWS OF TEXAS 1258, 1260-61 (1898) (tenth exception).

89. *Stockyards Nat'l Bank v. Maples*, 127 Tex. 633, 637, 95 S.W.2d 1300, 1301 (1936). "Resident" and "nonresident" in this subdivision mean residents and nonresidents in a particular Texas county and not residents and nonresidents of Texas. *Cf. supra* notes 72-82 and accompanying text (subdivision 3).

90. The resident defendant must have resided in the county at the time the suit was filed. *Chem-Spray Aerosols, Inc. v. Edwards*, 576 S.W.2d 478, 479 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ *dism'd*), or become a resident thereafter so long as residency is established before disposition of the plea. *Avery v. Llano Cotton Seed Oil Mill Ass'n*, 196 S.W. 351, 352 (Tex. Civ. App.—Fort Worth 1917, writ *ref'd*).

91. By "bona fide" claim the courts mean that each element of the claim must be proven by a preponderance of the evidence. See *Stockyards Nat'l Bank v. Maples*, 127 Tex. 633, 95 S.W.2d 1300 (1936).

92. *General Motors Corp. v. Williamson*, 575 S.W.2d 120, 122 (Tex. Civ. App.—Fort Worth 1978, writ *dism'd*); *Wallace v. Income Properties/Equity Trust*, 538 S.W.2d 17, 18 (Tex. Civ. App.—Austin 1976, writ *dism'd*); *Stockyards Nat'l Bank v. Maples*, 127 Tex. 633, 637, 95 S.W.2d 1300, 1302 (1936); see *Keith, supra* note 63, at J-17. Whether the nonresident is a proper party is established by reference to the controverting affidavit and the petition that reflect the nature of the suit. *Ladner v. Reliance Corp.*, 156 Tex. 158, 164, 293 S.W.2d 758, 763 (1956). This proper party requirement is satisfied when the cause of action against the resident grows out of the same transaction and is so intimately connected with the cause of action against the nonresident that the two should be joined under the rules intended to avoid a multiplicity of suits. *Stockyards Nat'l Bank v. Maples*, 127 Tex. 633, 637, 95 S.W.2d 1300, 1302 (1936).

93. 127 Tex. 633, 637, 95 S.W.2d 1300, 1302 (1936); see B. MCELROY, *supra* note 36, § 673, at 418-20.

94. *Stockyards Nat'l Bank v. Maples*, 127 Tex. 633, 637, 95 S.W.2d 1300, 1302 (1936).

95. *Id.* at 637, 95 S.W.2d at 1303.

96. *Id.* The court's reasoning is undermined by several lower court holdings. At least one court has held that venue is not defeated by a showing that the judgment against the resident would be worthless. *Mizell v. Longhorn Supply Co.*, 279 S.W.2d 167, 169 (Tex. Civ. App.—Galveston 1955, no writ) (resident defendant in bankruptcy). Also venue is not

The *Stockyards* decision can, however, be easily criticized. If knowledge of the allegations is all that is important, a plaintiff should never have to prove a cause of action in a venue hearing under any exception. Furthermore, the purpose of the venue hearing should not be to apprise the defendant of the merits of the suit. The purpose of the venue hearing is to decide the most convenient place for the trial. And if a cause of action must be proven, then rationally it should have to be proven against the nonresident defendant whose "valuable right" is in jeopardy.⁹⁷ This is the situation under subdivisions 9 and 23, where to maintain venue against a nonresident defendant the plaintiff must prove a cause of action against the nonresident.⁹⁸ This disparity as to whether the plaintiff must twice prove a cause of action against a nonresident defendant exemplifies the inconsistency that pervades the present venue statute. Moreover, because subdivision 4 mandates that the plaintiff prove a cause of action against the resident defendant but not against the nonresident defendant, the rule places the plaintiff in a paradoxical position. For example, the plaintiff may allege alternative causes of action against resident and nonresident defendants. In seeking to prove that the nonresident defendant is liable on an alternative theory based on the same facts, the plaintiff may be forced to argue against the liability of the resident defendant. On the other hand, proof of a cause of action against the resident defendant may tend to negate the liability of the nonresident.⁹⁹

Subdivision 4 is also unfair to all defendants. The nonresident defendant has the burden of defending the merits of the claim against the resident defendant at the venue hearing. This burden is unfair to the nonresident defendant because he may eventually wish to take a position at trial adverse to the resident defendant. Unfairness may also be present with respect to the resident defendant because he has no standing to defend

defeated by a showing that the resident defendant is not contesting the plaintiff's claim. *Collins v. Maylor*, 192 S.W.2d 332, 337 (Tex. Civ. App.—Forth Worth 1946, no writ); *see Parchman v. Parchman*, 239 S.W.2d 902, 903 (Tex. Civ. App.—Fort Worth 1951, no writ) (where resident defendant paid money into court to be paid over to one shown to be entitled thereto); *see also Slaton v. Anthony*, 143 S.W. 201, 204 (Tex. Civ. App.—Amarillo 1912, no writ) (settlement by resident defendant during the pendency of the suit).

97. A number of lower court cases have held that the plaintiff should be required to prove the cause of action against the nonresident defendant. *Taylor v. Whitehead*, 88 S.W.2d 716, 717 (Tex. Civ. App.—Fort Worth 1935, no writ); *Gordon v. Hemphill*, 80 S.W.2d 394, 395 (Tex. Civ. App.—Amarillo 1935, no writ); *McElwee & Co. v. Soutter*, 79 S.W.2d 878, 879 (Tex. Civ. App.—Dallas 1935, no writ). The trial court will not even consider whether the allegations against the nonresident are fraudulent. *Kirk v. Reynolds*, 244 S.W.2d 712, 713 (Tex. Civ. App.—Fort Worth 1951, writ *dism'd*). The court will also refuse to consider the evidence at the venue hearing indicating that the plaintiff has no valid claim against the nonresident. *Von Scheele v. Kugler-Morris Gen. Contractors, Inc.*, 532 S.W.2d 375, 381 (Tex. Civ. App.—Dallas 1975, writ *dism'd*). This means that the nonresident defendant is "compelled to incur the expense of litigation in a distant county on a claim which the court can see in advance is groundless." 1 R. McDONALD, *supra* note 63, § 4.10.2, at 444-45.

98. B. McELROY, *supra* note 36, § 673, at 422 (citing *Overseas Orders, Inc. v. Anaya*, 470 S.W.2d 72 (Tex. Civ. App.—San Antonio 1971, no writ)).

99. *Von Scheele v. Kugler-Morris Gen. Contractors, Inc.*, 532 S.W.2d 375 (Tex. Civ. App.—Dallas 1975, writ *dism'd*).

himself at the venue hearing.¹⁰⁰

*Article 1995(5)(a): Contract in Writing*¹⁰¹

Subdivision 5(a) applies to venue in cases dealing with contracts in general, while subdivision 5(b), added by the legislature in 1973,¹⁰² deals specifically with consumer contracts. Subdivision 5(a) provides that by naming the county where performance is to take place in writing in the contract the parties may predetermine that the venue of any subsequent dispute concerning the contract will lie in the projected county of the contract's performance. The original version of the contract exception to venue is found in the statutes of 1836 and is of Spanish origin.¹⁰³ The purpose of the original exception was to enforce the venue choice of a party who had obligated himself to perform at a certain location.¹⁰⁴ The venue facts that the plaintiff must prove to maintain venue under the current provision of subdivision 5(a) include:

- (1) that the defendant is a party reached by the statute; (2) that the claim is based upon a written contract; (3) that the contract was entered into by the defendant or one authorized to bind him; and
- (4) that the contract by its terms provides for performance of obligation sued upon in the county of suit.¹⁰⁵

Proof of a cause of action against the defendant is not required.¹⁰⁶

Although Texas courts have held that parties may not stipulate venue by contract,¹⁰⁷ subdivision 5(a) allows the parties to name the county where the contract will actually be performed and thereby indirectly establish the county where a suit on the contract will be heard.¹⁰⁸ The place of per-

100. See Guittard & Tyler, *supra* note 48, at 569-70.

101. TEX. REV. CIV. STAT. ANN. art. 1995(5)(a) (Vernon Supp. 1982); see 1 R. McDONALD, *supra* note 63, § 4.11.1; B. McELROY, *supra* note 36, § 674; Keith, *supra* note 63, at J-17.

102. 1973 Tex. Gen. Laws, ch. 213, § 1, at 489.

103. 1846 Tex. Gen. Laws, *supra* note 19, 1 H. GAMMEL, LAWS OF TEXAS 1260 (1898). The contract exception was amended in 1935 to clarify the confusion that had been caused by a variety of complex factual situations presented before the courts. Thane v. Dallas Joint Stock Land Bank, 129 S.W.2d 795, 800 (Tex. Civ. App.—Amarillo 1939, no writ); see 1935 Tex. Gen. Laws, ch. 213, § 3, at 503. The draftsman noted that the state of the law as to the contract clause of the venue statute was unsettled at best.

104. See Russell v. Green, 214 S.W. 448 (Tex. Civ. App.—Dallas 1919, no writ); Birge v. Lovelady, 145 S.W. 1194 (Tex. Civ. App.—Fort Worth 1912, writ dism'd); Seley v. Williams, 50 S.W. 399 (Tex. Civ. App. 1899, no writ).

105. Brazos Valley Harvestore Sys., Inc. v. Beavers, 535 S.W.2d 797, 800 (Tex. Civ. App.—Tyler 1975, writ dism'd) (citing General Motors Corp. v. Brady, 477 S.W.2d 385, 388-89 (Tex. Civ. App.—Tyler 1972, no writ)). The contractual exception did not originally require that the obligation be written. In an effort to minimize uncertainties, however, the written requirement was later added. 1 R. McDONALD, *supra* note 63, § 4.11.3.

106. Southwestern Inv. Co. v. Allen, 160 Tex. 258, 259, 328 S.W.2d 866, 867 (1959); Angler's Lodge, Inc. v. Scruggs, 532 S.W.2d 109, 111 (Tex. Civ. App.—San Antonio 1975, no writ).

107. Fidelity Union Life Ins. Co. v. Evans, 477 S.W.2d 535, 536 (Tex. 1972); International Travelers' Ass'n v. Branum, 109 Tex. 543, 547-48, 212 S.W. 630, 631 (1919).

108. The contractual provision providing for performance in a particular county must be at least one of the obligations sued upon. The plaintiff may not sue on one obligation and use the place of performance designated for a separate and distinct obligation. Rorschach v.

formance must also be named specifically to avoid loss of venue under subdivision 5(a).¹⁰⁹ For example, a promise to perform a contract in Amarillo has been held not to be sufficiently specific to satisfy subdivision 5(a) because Amarillo is located in both Potter and Randall counties.¹¹⁰ A contractual provision requiring payment to the Second National Bank of Houston is not specific enough to maintain venue in Harris County,¹¹¹ while payment at the First National Bank of San Antonio, Texas, is sufficient to maintain venue in Bexar County.¹¹² This confusion regarding the place of performance is compounded by the fact that many instruments that would not meet the technical legal requirements of a written contract for most purposes will nevertheless satisfy the requirements of subdivision 5(a). For example, invoices, delivery tickets, or bills of lading, even when unsigned, have been held to be written contracts sufficient to satisfy subdivision 5(a).¹¹³ These distinctions in the interpretation of legal terms are indicative of the frustrations of finding a way through the Texas venue maze.¹¹⁴

*Article 1995(5)(b): Consumer Contracts*¹¹⁵

Subdivision 5(b) provides that suit filed by the creditor of a consumer for an obligation to pay money for consumer goods may be brought in the county where the contract was signed by the defendant consumer or in the county of the defendant's residence. The venue facts to be established by the plaintiff are that the suit must be based on a consumer transaction¹¹⁶ and the contract must have been signed in the county of suit.¹¹⁷ The courts have broadly defined the term "consumer transaction," holding that a corporation may be a consumer for the purposes of subdivision 5(b).¹¹⁸

Pitts, 151 Tex. 215, 219, 248 S.W.2d 120, 123 (1952). If both obligations are joined in a single suit, however, only one of the obligations must be performable in the county of suit. Middlebrook v. David Bradley Mfg. Co., 86 Tex. 706, 706, 26 S.W. 935, 935 (1894).

109. The requirement that the contract expressly name the county or a particular place therein was added in 1935. The purpose was to make the language so plain that it would "admit of no construction that would fix venue by implication." Saigh v. Monteith, 147 Tex. 341, 344, 215 S.W.2d 610, 611 (1948).

110. Southwestern Inv. Co. v. Shipley, 400 S.W.2d 304 (Tex. 1966).

111. Saigh v. Monteith, 147 Tex. 341, 215 S.W.2d 610 (1948).

112. Yanta v. Davenport, 323 S.W.2d 636 (Tex. Civ. App.—San Antonio 1959, writ *dism'd*).

113. Lufkin Foundry & Mach. Co. v. Mixon, 445 S.W.2d 232, 234 (Tex. Civ. App.—Beaumont 1969, no writ); Hurlbut v. Lyons, 405 S.W.2d 398, 400 (Tex. Civ. App.—El Paso 1966, writ *dism'd*); see B. McELROY, *supra* note 36, § 674, at 424-25.

114. B. McELROY, *supra* note 36, § 674, at 424-25.

115. TEX. REV. CIV. STAT. ANN. art. 1995(5)(b) (Vernon Supp. 1982); see 1 R. McDONALD, *supra* note 63, § 4.11.6; B. McELROY, *supra* note 36, § 674; Keith, *supra* note 63, at J-18.

116. TEX. REV. CIV. STAT. ANN. art. 1995(5)(b) (Vernon Supp. 1982); see Amaya v. Texas Sec. Corp., 527 S.W.2d 218 (Tex. Civ. App.—San Antonio 1975, writ *ref'd n.r.e.*). Most of the litigation thus far has revolved around the meaning of the term "consumer transaction."

117. TEX. REV. CIV. STAT. ANN. art. 1995(5)(b) (Vernon Supp. 1982); see Castleberry v. Acco Feeds, 525 S.W.2d 282 (Tex. Civ. App.—Eastland 1975, no writ).

118. Beef Cattle Co. v. N.K. Parrish, Inc., 553 S.W.2d 220, 222 (Tex. Civ. App.—Amarillo 1977, no writ).

Subdivision 5(b) is not actually a separate exception to the basic venue provision since by its very terms it must be read in conjunction with subdivision 5(a). In other words, subdivision 5(a) will apply only in cases where subdivision 5(b) is not applicable; moreover, the plaintiff who seeks to rely on the former must show that the latter is not applicable.

Subdivision 5(b) was adopted in response to distant forum abuse wherein credit companies would require in the credit contract that payment by the consumer-debtor be made in a place more than 100 miles from the place of contract. If in default, the consumer had then consented to venue in a distant forum. This forced the consumer to the expense and inconvenience of distant travel in any debtor-creditor litigation.¹¹⁹ Subdivision 5(b) has not succeeded, however, in abrogating consumer difficulties. Texas venue practice requires the consumer-defendant to contest the venue in the county where the plaintiff has filed suit. Thus the venue issue must be determined in the distant forum.¹²⁰ As traveling to the distant forum to contest venue may be too costly for the defendant in an ordinary, low-dollar consumer suit, consumers are left in the predicament of litigating in a foreign venue in order to avoid that very task. The Texas Deceptive Trade Practices Act provides that distant forum abuse is a deceptive trade act and thus subjects violators to treble damages.¹²¹ From the perspective of the creditors, however, the risk of an occasional claim for treble damages¹²² might be justified by the large number of consumers who would simply fail to contest the suit at all. Additionally, in the ordinary, low-dollar consumer transaction even treble damages and attorneys' fees present no real monetary threat to a corporate plaintiff.

*Article 1995(6): Executors, Administrators, Guardians*¹²³

Venue in suits for money demands against executors, administrators, or guardians of estates may be maintained under subdivision 6 in the county where the estate is administered. This exception is of Spanish origin,¹²⁴ the original statute including all suits against the subject fiduciaries, not just money demands.¹²⁵ The legislature revised the statute to narrow the application of the exception to money demands only, thus preserving the defendant's privilege in all other cases.¹²⁶ The motive behind the exception was one of administrative convenience, as well as the public policy

119. See Sampson, *Distant Forum Abuse in Consumer Transactions: A Proposed Solution*, 51 TEXAS L. REV. 269 (1973).

120. Dorsaneo, *Creditors' Rights, Annual Survey of Texas Law*, 32 SW. L.J. 245, 263 n.159 (1978).

121. TEX. BUS. & COM. CODE ANN. § 17.46(b)(22) (Vernon Supp. 1982).

122. *Id.* § 17.50.

123. TEX. REV. CIV. STAT. ANN. art. 1995(6) (Vernon Supp. 1982); see 1 R. McDONALD, *supra* note 63, § 4.12; B. McELROY, *supra* note 36, § 675; Keith, *supra* note 63, at J-18.

124. 1836 Tex. Gen. Laws, *supra* note 19, 1 H. GAMMEL, LAWS OF TEXAS 1258 (1898).

125. *Id.*

126. Tex. Civ. Stat. art. 1198(6) (1879); see *Crosson v. Dwyer*, 30 S.W. 929, 930 (Tex. Civ. App. 1895, writ ref'd). "In 1977 the legislature added a provision that if the suit grows out of a negligent act or omission of the person whose estate the [fiduciary] represents, the suit may be brought in the county where the act or omission occurred." 1 R. McDONALD,

against multiple suits and expensive scattered litigation.¹²⁷ To qualify for the exception the plaintiff must prove that the suit is against an executor to establish a money demand against an estate, and the suit was brought in the county where the estate is administered.¹²⁸ Subdivision 6 has limited application; it does not apply to actions to construe a will¹²⁹ or to resolve adverse claims of beneficiaries.¹³⁰

*Article 1995(7): Fraud and Defalcation*¹³¹

Subdivision 7 provides that suits based on fraud, or suits based on defalcation by public officers may be brought in the county where the cause of action arose. Alternatively, suit may be brought where the defendant has his domicile. The original version of this exception dealt with venue in cases of fraud or delinquencies on the part of public officers.¹³² This exception was justified by the deceit that injured the plaintiff.¹³³ Consequently, allowing suit to be brought in the county where the defendant committed the fraudulent act was reasonable.¹³⁴

To maintain venue on a fraud claim under the current subdivision 7, the plaintiff faces a difficult burden of proof. The plaintiff must prove that: (1) the fraud occurred; (2) it was committed by the defendant or one for whose acts the defendant is legally responsible; and (3) the fraud occurred in the county where suit is filed.¹³⁵ Further, the plaintiff must prove that fraud is the gist of his suit rather than merely incidental to the main claim.¹³⁶ Finally, the plaintiff must prove by a preponderance of the evi-

supra note 63, § 4.12, at 463; *see also* TEX. REV. CIV. STAT. ANN. art. 1995(6) (Vernon Supp. 1982).

127. *See* Neill v. Owen, 3 Tex. 145, 147 (1848). Part of the rationale for the exception may have been that by requiring the suit to be brought where the succession was opened, it would be attended with less expense. *Id.*; *see also* Richardson v. Wells, 3 Tex. 223, 233-34 (1848). These purposes were probably lost when this subdivision was made permissive in 1925. *See* Tex. Rev. Civ. Stat. art. 1995(6) (1925).

128. Anderson v. Huie, 266 S.W.2d 410, 411 (Tex. Civ. App.—Dallas 1954; no writ).

129. 1 R. McDONALD, *supra* note 63, § 4.12; B. McELROY, *supra* note 36, § 675, at 431; *see* Crosson v. Dwyer, 30 S.W. 929, 930 (Tex. Civ. App. 1895, writ *ref'd*).

130. *See* Nunn v. Titcher-Goettinger Co., 196 S.W. 890, 892 (Tex. Civ. App.—Dallas 1917), *aff'd*, 245 S.W. 421, 422 (Tex. 1922); Joy v. Citizens' Life Ins. Co., 178 S.W. 590, 592 (Tex. Civ. App.—Dallas 1915, no writ). Subdivision 6 also does not apply to an action against an individual for failure to perform his duties faithfully while serving as an executor, administrator, or guardian, or against the sureties on his bond. *See* Morton v. Morris, 56 S.W. 559, 559 (Tex. Civ. App. 1900, no writ); Stewart v. Morrison, 81 Tex. 396, 399, 17 S.W. 15, 17 (1891).

131. TEX. REV. CIV. STAT. ANN. art. 1995(7) (Vernon 1964); *see* 1 R. McDONALD, *supra* note 63, § 4.13; B. McELROY, *supra* note 36, § 676; Keith, *supra* note 63, at J-19.

132. 1836 Tex. Gen. Laws, *supra* note 19, 1 H. GAMMEL, LAWS OF TEXAS 1258 (1898).

133. Wintz v. Morrison, 17 Tex. 372, 384 (1856).

134. Freeman v. Kuechler, 45 Tex. 592, 597 (1876).

135. Instant Credit Serv., Inc. v. McClanahan, 497 S.W.2d 954, 956 (Tex. Civ. App.—Austin 1973, writ *dism'd*). The fraud may be actual or constructive. Boothe v. Fiest, 80 Tex. 141, 144, 15 S.W. 799, 800 (1891). This assumes, of course, that the plaintiff does not wish to pursue venue in the county of the defendant's domicile.

136. *See* Banks v. Merritt, 537 S.W.2d 494, 495 (Tex. Civ. App.—Tyler 1976, no writ), and cases cited therein.

dence "every constituent element of . . . fraud,"¹³⁷ including: (1) a false representation made by the defendant; (2) reliance by the plaintiff upon the false representation; (3) action in reliance by the plaintiff; (4) damage resulting from such false representation;¹³⁸ and (5) proof that some actual damage was suffered.¹³⁹

By providing the option of venue at the defendant's domicile, subdivision 7 repeats the basic venue rule of article 1995; the defendant should have the benefit of being sued at his domicile. This drafting defect of repetition is minor, however, when compared with the extreme burden of proof placed upon the plaintiff to prove every element of fraud simply to establish venue. This high degree of proof is not only burdensome, but inappropriate to a determination of the most convenient place for trial.

A final criticism can be made regarding the exception's inclusion of defalcation by a public official. This provision is superfluous and should be eliminated. If the public official has access to public funds, it will ordinarily be in the course of his employment by the state. Thus, the defalcation would occur in the county where the public employee is serving, and the suit will normally be maintainable there.¹⁴⁰

*Article 1995(8): Attachment and Sequestration*¹⁴¹

Subdivision 8 allows the plaintiff to maintain a suit for damages for abuse of process on writs of attachment or sequestration in the county where the writ was issued. Prior to the enactment of the exception in 1889,¹⁴² venue of actions based on levies and attachments was governed by local rule and varied from court to court.¹⁴³ The legislative purpose in unifying the procedure was to promote consistency in treatment and encourage administrative efficiency.¹⁴⁴ Under this exception the venue facts the plaintiff must prove include that the writ was wrongfully sued out¹⁴⁵ and that the writ was levied in whole or in part upon property located in the county of suit.¹⁴⁶ Subdivision 8 has been held not to apply to writs of

137. *Id.*

138. See *Brooks v. Parr*, 507 S.W.2d 818, 820 (Tex. Civ. App.—Amarillo 1974, no writ); *Madison v. Harper*, 395 S.W.2d 842, 843 (Tex. Civ. App.—Amarillo 1965, no writ).

139. See *Coalson v. Holmes*, 111 Tex. 502, 240 S.W. 896 (1922); *Wise v. Thompson*, 540 S.W.2d 837 (Tex. Civ. App.—Texarkana 1976, no writ); *Safeway Stores, Inc. v. Amburn*, 380 S.W.2d 727 (Tex. Civ. App.—Fort Worth 1964, writ *dism'd*).

140. B. MCELROY, *supra* note 36, § 676.

141. TEX. REV. CIV. STAT. ANN. art. 1995(8) (Vernon 1964); see I R. McDONALD, *supra* note 63, § 4.14; B. MCELROY, *supra* note 36, § 677; Keith, *supra* note 63, at J-19.

142. 1889 Tex. Gen. Laws, ch. 52, § 1, at 48, 9 H. GAMMEL, LAWS OF TEXAS 1076 (1898).

143. J. TOWNES, *supra* note 74, at 316.

144. *Focke v. Blum*, 82 Tex. 436, 436, 17 S.W. 770, 771 (1891); *Thomason v. Crawford*, 103 S.W. 191, 192 (Tex. Civ. App. 1907, no writ).

145. See *Dallas Joint Stock Land Bank v. Lancaster*, 91 S.W.2d 890, 891 (Tex. Civ. App.—Waco 1936, no writ); *Headington Auto Co. v. Hood*, 219 S.W. 511, 511 (Tex. Civ. App.—Texarkana 1920, no writ).

146. *Darr Equip. Co. v. Holland Page, Inc.*, 355 S.W.2d 595, 596 (Tex. Civ. App.—Austin 1962, writ *dism'd*).

garnishment¹⁴⁷ and is limited to writs of attachment and sequestration.

While permitting the plaintiff to maintain venue in the county where the abuse of process occurred is a just rule, history has shown that carving out a special exception for this limited purpose is hardly necessary. Only one case relying on subdivision 8 has reached the appellate level in the past thirty years.¹⁴⁸ Consequently, the exception could be deleted with minimal effect upon injured plaintiffs.

*Article 1995(9): Crime or Trespass*¹⁴⁹

Subdivision 9 allows the plaintiff to bring a civil suit based on a crime, offense, or trespass in the county where such act occurred or in the county of the defendant's domicile. This exception is of Spanish origin and was one of the first seven exceptions to the general rule found in the original Republic of Texas venue statute.¹⁵⁰ The purpose of the exception is to promote the interests of the injured party as opposed to the interests of the wrongdoer.¹⁵¹ The term "trespass" has been interpreted to include negligence actions, as well as intentional torts:

[There is] no good reason why a distinction should be made between an injury resulting from intentional violence and one resulting from negligence. It occurs to us the consideration which induced the exception was that one who had been injured in his person or his property by the wrongful or negligent conduct of another, should not be driven to a distant forum to get a redress of his wrongs.¹⁵²

Two sets of venue facts are required by subdivision 9, one for a crime or offense, the other for trespass.¹⁵³ If the plaintiff bases his claim on a crime or offense of the defendant, then the plaintiff must plead and prove by a preponderance of evidence that: (1) a crime or offense has been committed; (2) the crime or offense was committed in the county of suit where venue is alleged; and (3) the defendant participated as a principal, accomplice, or accessory,¹⁵⁴ or that the offense was committed by the defendant's

147. *Allied Fin. Co. v. Crawford*, 340 S.W.2d 824, 825-26 (Tex. Civ. App.—Amarillo 1960, no writ).

148. *B. McELROY*, *supra* note 36, § 677, at 436 (citing *Darr Equip. Co. v. Holland Page, Inc.*, 355 S.W.2d 595 (Tex. Civ. App.—Austin 1962, writ dismissed)).

149. TEX. REV. CIV. STAT. ANN. art. 1995(9) (Vernon 1964); see 1 R. McDONALD, *supra* note 63, §§ 4.15-17.1; *B. McELROY*, *supra* note 36, § 678; *Keith*, *supra* note 63, at J-20.

150. 1836 Tex. Gen. Laws, *supra* note 19, 1 H. GAMMEL, LAWS OF TEXAS 1258 (1898). The original statute did not include the word "trespass"; this addition was adopted in 1953. See 1953 Tex. Gen. Laws, ch. 107, § 1, at 390.

151. *Hill v. Kimball*, 76 Tex. 210, 217, 13 S.W. 59, 60 (1890).

152. *Id.*

153. Whether the suit is based upon a crime, offense, or trespass depends upon the nature of the action, to be determined by reference to the pleading. *Hurley v. Reynolds*, 157 S.W.2d 1018, 1022 (Tex. Civ. App.—Eastland 1941, no writ).

154. See *Pearson v. Stevens*, 446 S.W.2d 381, 383 (Tex. Civ. App.—Houston [1st Dist.] 1969, no writ); *Allied Fin. Co. v. Meyer*, 371 S.W.2d 579, 580 (Tex. Civ. App.—Houston 1963, no writ); *Gorbett Bros. Welding Co. v. Malone*, 254 S.W.2d 848, 851 (Tex. Civ. App.—Amarillo 1952, no writ). A causal connection between the crime and the injury need not be proved by extrinsic evidence, because this may be determined from the pleadings. *Gann v. Murray*, 151 Tex. 130, 134-35, 246 S.W.2d 616, 619 (1952). On the other hand, the plaintiff

agent or representative in the course of his employment. The courts have given the same meaning to the terms "crime" and "offense,"¹⁵⁵ a crime being defined as an act that would be punishable under the Penal Code.¹⁵⁶ In actions for trespass under subdivision 9, the venue facts the plaintiff must establish include: (1) a prima facie case of liability in trespass; (2) occurring in the county of suit; (3) committed by the defendant or one for whom defendant is legally responsible.¹⁵⁷ Suits for conversion of personal property are currently the most common actions pursued by plaintiffs using the trespass exception of subdivision 9.¹⁵⁸

Subdivision 9 was one of the most frequently litigated exceptions prior to 1953; at that time subdivision 9a was added to deal with actions based on negligence.¹⁵⁹ Only three cases have arisen under the "crime or offense" section of subdivision 9 in the past decade.¹⁶⁰ The balance of venue actions in this area have shifted to subdivision 9a.

*Article 1995(9a): Negligence*¹⁶¹

Subdivision 9a permits a plaintiff to maintain a negligence suit in the county where the negligent act or negligent omission occurred, or in the county of the defendant's domicile.¹⁶² This exception was enacted in 1953 to answer criticism concerning the Texas courts' attempts to handle negligence cases under the trespass language of subdivision 9.¹⁶³ The legislature sought to resolve this confusion by mandating that only subdivision 9a could apply to actions based on "negligence."¹⁶⁴ In addition, the language of the revision used the terms "active and passive" to describe negligence, because the courts in prior decisions had failed to include passive negligence as an exception to the general venue rule.¹⁶⁵ The "trespass" language in subdivision 9 had been construed by the Texas Supreme Court

must prove he has sustained some damages, although not necessarily the extent thereof. *Wiederkehr v. Coker*, 304 S.W.2d 185, 188 (Tex. Civ. App.—Eastland 1975, no writ).

155. *Thomas v. Meyer*, 168 S.W.2d 681, 683 (Tex. Civ. App.—San Antonio 1943, no writ); *Chiles v. Goswick*, 148 Tex. 306, 309, 225 S.W.2d 411, 412 (1949).

156. *Gann v. Murray*, 151 Tex. 130, 133, 246 S.W.2d 616, 618 (1952).

157. *Langford v. Kraft*, 498 S.W.2d 42, 50 (Tex. Civ. App.—Beaumont 1973, writ ref'd n.r.e.).

158. *B. McELROY*, *supra* note 36, § 678 n.61, at 441; *see Peters v. Parker*, 591 S.W.2d 327, 329 (Tex. Civ. App.—Waco 1979, writ dism'd).

159. 1953 Tex. Gen. Laws, ch. 107, § 1, at 390.

160. *B. McELROY*, *supra* note 36, § 678, at 440 (citing *Pearson v. Stevens*, 446 S.W.2d 381 (Tex. Civ. App.—Houston [1st Dist.] 1969, no writ); *Adami v. Dobie*, 440 S.W.2d 330 (Tex. Civ. App.—San Antonio 1969, writ dism'd); *Light v. Transport Ins. Co.*, 419 S.W.2d 223 (Tex. Civ. App.—Dallas 1967, no writ)).

161. TEX. REV. CIV. STAT. ANN. art. 1995(9a) (Vernon 1964 & Supp. 1982); *see* 1 R. McDONALD, *supra* note 63, § 4.17.2; *B. McELROY*, *supra* note 36, § 679; *Keith*, *supra* note 63, at J-20 to -21.

162. Negligence per se is included in the statutory language, as is common law negligence. TEX. REV. CIV. STAT. ANN. art. 1995(9a) (Vernon 1964 & Supp. 1982).

163. 1953 Tex. Gen. Laws, ch. 107, § 1, at 390; *see* 1 R. McDONALD, *supra* note 63, § 4.17.2; *see also* Comment, *Venue: The "Trespass" Exception in Automobile Accident Cases*, 29 TEXAS L. REV. 513 (1951).

164. 1 R. McDONALD, *supra* note 63, § 4.17.2.

165. For a complete discussion of this problem, *see* Comment, *supra* note 163.

in *Hill v. Hill* to include negligently inflicted injuries as well as international trespasses.¹⁶⁶ The Texas Supreme Court, however, drew a distinction that added further perplexity to this area when it construed the statute to be applicable only to cases where a willfully or negligently committed act could be shown.¹⁶⁷ Thus, the trespass language of the original subdivision 9 did not include failure to perform a duty (negligence by omission).¹⁶⁸ Later, courts dwelled on the distinction between an act and an omission. Attempts to characterize the negligent act itself as active negligence or passive negligence took precedence over the central question of venue.¹⁶⁹

For an example of the problems this confusion caused, consider the subtle difference in interpreting the trespass language as an affirmative act of negligence versus an omission of a duty in *McCrary v. Coates*,¹⁷⁰ as opposed to interpreting the trespass language to include any wrongful act committed that causes damage, as in *Campbell v. Wylie*.¹⁷¹ This subtle difference in the phrasing of the trespass language in subdivision 9 led the *McCrary* court to find that *failure* to use care in operating an automobile was not an affirmative act within the ambit of the exception,¹⁷² while the *Campbell* court found that negligent driving was an *act committed* by the defendant and therefore was covered by subdivision 9.¹⁷³ The legislature's subsequent enactment of subdivision 9a was clearly directed to remedy this area of legal hairsplitting, which had become especially burdensome because of the large number of negligence cases dealing with automobile accidents that invoked the benefits of this exception.¹⁷⁴

The venue facts the plaintiff must establish to come within this exception are specified in the subdivision itself:

1. That an act or omission of negligence occurred in the county where suit was filed.
2. That such act or omission was that of the tortfeasor, in person, or that of his servant, agent or representative acting within the scope of his employment
3. That such negligence was a proximate cause of plaintiff's injuries.¹⁷⁵

The requirement that the plaintiff must establish proximate cause of injury in the venue hearing has been held to require proof of some actual injury,¹⁷⁶ but the extent of the injury or damage is not a part of the required venue facts.¹⁷⁷ Additionally, the county where the damage occurred is not a material venue fact;¹⁷⁸ the county where the negligent act occurred is the

166. 76 Tex. 210, 216, 13 S.W. 59, 60 (1890).

167. *Ricker, Lee & Co. v. Shoemaker*, 81 Tex. 22, 25-26, 16 S.W. 645, 645 (1891).

168. *Id.* at 26, 16 S.W. at 645.

169. See Comment, *supra* note 163, at 517-22.

170. 38 S.W.2d 393, 394-95 (Tex. Civ. App.—Galveston 1931, no writ).

171. 212 S.W. 980, 980 (Tex. Civ. App.—Texarkana 1919, writ ref'd).

172. 38 S.W.2d at 395.

173. 212 S.W. at 980.

174. See Comment, *supra* note 163, at 530.

175. TEX. REV. CIV. STAT. ANN. art. 1995(9a) (Vernon Supp. 1982).

176. *Leal v. Ramirez*, 553 S.W.2d 134, 137 (Tex. Civ. App.—San Antonio 1977, no writ).

177. *Spoon v. Penix*, 422 S.W.2d 167, 168 (Tex. 1967).

178. *Main Bank v. Davy Crockett Inn of New Braunfels, Inc.*, 531 S.W.2d 388, 391 (Tex.

critical fact.¹⁷⁹ The act or omission must also be that of the defendant or his agent.¹⁸⁰ This requirement engenders problems of interpretation of agency¹⁸¹ and the scope of the employment duties of an employee.¹⁸²

Subdivision 9a currently is one of the most litigated of the exceptions to the general venue rule. The plaintiff is put to the undue burden of proving the cause of action at a preliminary hearing if he wishes to retain venue in the county where the negligent act occurred. Consequently, to avail himself of the protection that the legislature intended to bestow upon him, the plaintiff must litigate the merits of his case at what should be a procedural hearing. The county where the negligent act occurred is usually the one where the witnesses and evidence will be most conveniently found. If the plaintiff fails to prove his cause of action at the venue hearing, the place of venue will be transferred to the defendant's domicile, and the most logical and convenient venue will be lost.

*Article 1995(10): Personal Property*¹⁸³

A plaintiff may maintain a suit to recover personal property from the defendant in the county where the property is located, or in the county where the defendant resides.¹⁸⁴ The ancestor of subdivision 10 is found in the 1836 Laws of the Republic of Texas and is of Spanish origin.¹⁸⁵ This exception focuses on the convenience of the plaintiff.¹⁸⁶

To maintain venue under this exception, the plaintiff must prove that the suit is for recovery of personal property and the property is located in the county of suit.¹⁸⁷ The plaintiff is not required to prove a cause of action against the defendant,¹⁸⁸ but the petition must state a cause of action that, if proven at trial, would show plaintiff's right to the property.¹⁸⁹ Con-

Civ. App.—Austin 1975, no writ); *Wright v. Climatic Air Sales, Inc.*, 527 S.W.2d 518, 520 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ).

179. *Leonard v. Abbott*, 366 S.W.2d 925, 927-28 (Tex. 1963). The plaintiff is not required to negate affirmative defenses. 1 R. McDONALD, *supra* note 63, § 4.17.2.

180. *See International Sec. Life Ins. Co. v. Henderson*, 455 S.W.2d 200, 201 (Tex. 1970).

181. *See id.*

182. *Barber v. Intercoast Jobbers & Brokers*, 417 S.W.2d 154, 158-59 (Tex. 1967). A rebuttable presumption of agency and of the scope of employment can arise by ownership of a vehicle in the name of someone other than the tortfeasor. *Strickland Transp. Co. v. Ingram*, 403 S.W.2d 192, 195 (Tex. Civ. App.—Texarkana 1966, writ dismissed).

183. TEX. REV. CIV. STAT. ANN. art. 1995(10) (Vernon 1964); *see* 1 R. McDONALD, *supra* note 63, § 4.18; B. McELROY, *supra* note 36, § 680; Keith, *supra* note 63, at J-21.

184. A number of the venue exceptions also permit the plaintiff to choose the county of the defendant's domicile. These provisions are of course superfluous, for if the plaintiff wished to file suit at the county of defendant's domicile, he need merely use the general rule instead of the exception.

185. 1836 Tex. Gen. Laws, *supra* note 19, 1 H. GAMMEL, LAWS OF TEXAS 1258 (1898).

186. *Richardson v. Wells*, 3 Tex. 223, 232 (1848).

187. *Allen v. Hamilton Nat'l Bank*, 459 S.W.2d 955, 956 (Tex. Civ. App.—Waco 1970, no writ).

188. *Walshak v. Walshak*, 417 S.W.2d 307, 308 (Tex. Civ. App.—Corpus Christi 1967, no writ); *Allen v. Hamilton Nat'l Bank*, 459 S.W.2d 955, 956 (Tex. Civ. App.—Waco 1970, no writ).

189. *See Frost v. Wells*, 388 S.W.2d 235, 238-39 (Tex. Civ. App.—Amarillo 1965, writ dismissed).

sequently, the burden upon the plaintiff under this subdivision is not as onerous as those under other article 1995 exceptions.

Few recent reported cases have relied upon subdivision 10.¹⁹⁰ The reason for the limited use of subdivision 10 may be the popularity of venue exceptions based on written contracts and on corporations.¹⁹¹ Rarely would personal property be in the hands of another (other than a thief) unless that other person is acting under a written contract, for example as in the sale of goods. As repossessors are usually corporations, an exception dealing with corporations or with written contracts could be used in lieu of an exception based on personal property. Another possible reason for the scarcity of opinions dealing with subdivision 10 is that actions involving conversion of property can also be brought under subdivision 9. Consequently, the benefits of subdivision 10 are limited when viewed in the context of the entire venue statute.

*Article 1995(11): Inheritances*¹⁹²

Subdivision 11 authorizes the plaintiff to maintain an inheritance suit against a defendant who has inherited the estate in the county where the estate principally lies. This exception was adopted by the Republic of Texas and is derived from Spanish law.¹⁹³ Early lawmakers may have felt a need to unify suits dealing with estates in a limited number of forums;¹⁹⁴ thus they perpetuated subdivision 11. The lawmakers may have also felt that the plaintiff should be provided with a permissive forum at the place where the subject of the suit, the inheritance, was located. The fear may have been that a prodigal son, beyond the reach of hometown creditors, would siphon off his inheritance from afar, leaving the creditors of the estate with no convenient venue. On the other hand, the intent of the legislature may have also been to require suits between heirs to be brought where the estate is located because of practical concerns, primarily the availability of the evidence.¹⁹⁵

For the plaintiff to avail himself of this exception, he must prove that the defendant inherited an estate upon which the suit is based and that the estate lies principally in the county where the plaintiff has filed suit.¹⁹⁶

190. B. MCELROY, *supra* note 36, § 680. McElroy has suggested that no need exists for this exception. *Id.*

191. TEX. REV. CIV. STAT. ANN. art. 1995(5), (23) (Vernon 1964 & Supp. 1982).

192. *Id.* art. 1995(11) (Vernon 1964); see 1 R. McDONALD, *supra* note 63, § 4.19; B. MCELROY, *supra* note 36, § 681; Keith, *supra* note 63, at J-21.

193. 1836 Tex. Gen. Laws, *supra* note 19, 1 H. GAMMEL, LAWS OF TEXAS 1258 (1898).

194. Richardson v. Wells, 3 Tex. 223, 233-34 (1848).

195. The purpose for this exception is difficult to discern, in part because its ambit is undefined. As might be expected, no legislative history is available to determine if this exception is limited to suits between heirs or if it can include creditors of the estate. The only case dealing with this exception involves a dispute between heirs. See Deason v. Rogers, 499 S.W.2d 14 (Tex. Civ. App.—Corpus Christi 1973, writ dismissed). The issue of whether the estate's creditors can use this exception remains unresolved.

196. See *id.* at 16-17. The nature of the suit is to be determined from the petition, but the location of the estate must be established by extrinsic evidence. 1 R. McDONALD, *supra* note 63, § 4.19.

Only one case has reached the appellate level relying on subdivision 11.¹⁹⁷ This is because in most situations other venue exceptions will fix the venue in the county of the estate's location.¹⁹⁸ These other exceptions include subdivision 6, which deals with suits against administrators of estates,¹⁹⁹ and subdivision 18, which deals with suits for revision of probate.²⁰⁰ The situation addressed in subdivision 11 thus seems so specialized and unusual that it is questionable whether the subject should be specifically addressed in the general venue statute.²⁰¹

*Article 1995(12): Lien*²⁰²

Subdivision 12 allows the plaintiff to bring suit to foreclose a mortgage or other lien on real or personal property in the county where the property or any part of it is located.²⁰³ As originally enacted in 1846²⁰⁴ subdivision 12 concerned mortgages only and was held not to apply to liens on property.²⁰⁵ The subdivision was amended in 1863 to include the words "or other lien" after the word "mortgages," thus extending the application of the subdivision to liens.²⁰⁶ The basic rule of the exception grants the plaintiff a choice of venue as the subdivision was enacted to favor the plaintiff.²⁰⁷ To qualify for this exception the plaintiff must prove that the action is for foreclosure of a lien and that the property is located in the county of suit.²⁰⁸ Proof of a valid lien under subdivision 12 is not necessary; the plaintiff need only plead the existence of a lien.²⁰⁹ The location of the

197. *Deason v. Rogers*, 499 S.W.2d 14 (Tex. Civ. App.—Corpus Christi 1973, writ *dism'd*).

198. 1 R. McDONALD, *supra* note 63, § 4.19, at 481.

199. TEX. REV. CIV. STAT. ANN. art. 1995(6) (Vernon Supp. 1982); *see supra* notes 123-30 and accompanying text.

200. TEX. REV. CIV. STAT. ANN. art. 1995(18) (Vernon 1964); *see infra* notes 264-70 and accompanying text.

201. B. McELROY, *supra* note 36, § 681.

202. TEX. REV. CIV. STAT. ANN. art. 1995(12) (Vernon 1964); *see* 1 R. McDONALD, *supra* note 63, § 4.20; B. McELROY, *supra* note 36, § 682; Keith, *supra* note 63, at J-21 to -22.

203. *Cf.* TEX. REV. CIV. STAT. ANN. art. 1995(11) (Vernon 1964), dealing with the inheritance exception, where the question concerns the county where the estate "principally lies." *Id.*

204. 1846 Tex. Gen. Laws, An Act To Regulate Proceedings in the District Courts § 119, at 394, 2 H. GAMMEL, LAWS OF TEXAS 1669 (1898).

205. *Coffee v. Haynes*, 24 Tex. 190, 191 (1859).

206. 1863 Tex. Gen. Laws, ch. 17, § 1, at 10, 5 H. GAMMEL, LAWS OF TEXAS 664 (1898); *see Hays v. Stone*, 36 Tex. 181, 186 (1871).

207. *Kinney v. McCleod*, 9 Tex. 78, 79 (1852).

208. *Hagan v. Anderson*, 506 S.W.2d 298, 301 (Tex. Civ. App.—San Antonio 1973), *writ ref'd n.r.e. per curiam*, 513 S.W.2d 818 (Tex. 1974). Strangely enough, the suit need not be for an actual foreclosure of a lien. A suit seeking a declaratory judgment for the establishment of an enforceable lien is sufficient. *Citizens Nat'l Bank v. Cattleman's Prod. Credit Ass'n*, 617 S.W.2d 731, 733 (Tex. Civ. App.—Waco 1981, no writ).

209. *Morgan Farms v. Brown*, 231 S.W.2d 791, 791 (Tex. Civ. App.—San Antonio), *leave to file petition for mandamus overruled per curiam sub nom.* *Morgan Farms v. Murray*, 149 Tex. 319, 233 S.W.2d 123 (1950). The lien may be an express contractual obligation or an equitable or implied lien. *See First Trust Co. v. Good Land Lumber Co.*, 297 S.W.2d 312, 315-16 (Tex. Civ. App.—Waco 1956, no writ); *Brooks v. Herren*, 30 S.W.2d 561, 562 (Tex. Civ. App.—San Antonio 1930, writ *dism'd*).

property involved must be proven by extrinsic evidence.²¹⁰

In *Morgan Farms v. Murray*²¹¹ the Texas Supreme Court held that the nature of the plaintiff's suit is proven by the pleadings in the case, not by the evidence. Thus the plaintiff is relieved of the burden of actually proving a cause of action, here a valid lien, against the defendant. This is a significant lessening of the plaintiff's usual burden in qualifying for an exception under the general venue rule, although Texas precedent for this point is in conflict.²¹² The fact that so much contrary precedent exists in the Texas venue practice is one of the major criticisms of the Texas system. The uncertainty regarding the degree of proof required at the venue hearing has caused expensive and time-consuming litigation concerning subjects that should not be considered for the purposes of deciding the place of trial. Additionally, subdivision 12 is an example of the difficulty involved in interpreting specific statutory venue language. From its inception as part of the venue statute, the term "mortgage" has required appellate court definition.²¹³ The legislature has thus been forced to tinker with the statute in an attempt to cure this problem.²¹⁴

*Article 1995(13): Partition*²¹⁵

Subdivision 13 permits the plaintiff to maintain suit for the division of real or personal property in the county where the property is located or in the county where the defendant resides. This exception seems to have grown out of early state laws dealing with partition of real²¹⁶ and personal property.²¹⁷ Subdivision 13 first appeared in the original codification of the Revised Civil Statutes of 1879.²¹⁸ Prior to 1879 Texas legislators apparently assumed that suits for partition of property would either be brought under the provisions dealing with suits for land or the provisions concerning personal property. No act of the legislature has been found that specifically adds subdivision 13 to the venue statute. It simply appears

210. *Ross v. Gulf Ref. Co.*, 530 S.W.2d 859, 859-60 (Tex. Civ. App.—Eastland 1975, no writ); *Hagan v. Anderson*, 506 S.W.2d 298, 301 (Tex. Civ. App.—San Antonio 1973), *writ ref'd n.r.e. per curiam*, 413 S.W.2d 818 (Tex. 1974).

211. 149 Tex. 319, 233 S.W.2d 123 (1950).

212. *See Knappe v. Davidson*, 465 S.W.2d 448, 450 (Tex. Civ. App.—Tyler 1971, writ *dism'd*) (adopting the *Morgan Farms* decision on subdivision 12, but citing contrary precedent).

213. *See supra* note 205 and accompanying text.

214. *See supra* note 206 and accompanying text.

215. TEX. REV. CIV. STAT. ANN. art. 1995(13) (Vernon 1964); *see* 1 R. McDONALD, *supra* note 63, § 4.21; B. McELROY, *supra* note 36, § 683; Keith, *supra* note 63, at J-22 to -23.

216. 1840 Tex. Gen. Laws, An Act To enable part owners of Land to obtain Partition thereof, and for other purposes, 2 H. GAMMEL, LAWS OF TEXAS 245 (1898). Venue is not, however, addressed specifically in this act.

217. 1851 Tex. Gen. Laws, ch. 26, §§ 1-7, at 20, 3 H. GAMMEL, LAWS OF TEXAS 898 (1898). Venue is not addressed specifically in this act, but the act does mandate that a writ of execution is to be issued to officers of the county where the personal property may be located.

218. *See* 1876 Tex. Gen. Laws, ch. 60, §§ 1-4, at 58-59, 8 H. GAMMEL, LAWS OF TEXAS 894 (1898) (act authorizing the creation of the Revised Civil Statutes).

in the Revised Civil Statutes of 1879.²¹⁹ Consequently, no discernable purpose for the addition of the subdivision has been discovered.

To qualify for the real property exception, the plaintiff must allege that the suit is for partition and that the land in controversy is located within the county of alleged venue. With regard to the personal property exception, the plaintiff must establish that the property is personal property and that it is located in the county of suit. In the alternative, the plaintiff must establish that one or more defendants reside in the county of suit.²²⁰ The venue facts differ with regard to real property because subdivision 13 must be interpreted in light of subdivision 14. The latter exception concerns venue in suits to recover title to lands, whereas the last sentence of subdivision 13 states that "[n]othing herein shall be construed to fix venue of a suit to recover the title to land."²²¹ Consequently, subdivision 14 is mandatory, requiring that suits for land title must be maintained in the county where the land is located, while subdivision 13 is permissive. Subdivision 14 thus takes precedence over subdivision 13 in real property title disputes, with the result that subdivision 13 can only apply to real property if title is not disputed. To maintain venue under subdivision 13 in suits concerning real property, therefore, the plaintiff must prove that no title dispute exists.²²² Consequently, in any case where the defendant asserts an adverse conflicting title claim to real property, and the plaintiff is unable to prove the contrary at the venue hearing, subdivision 14, not subdivision 13, must apply.²²³

Furthermore, if the legislature determines that suits for title to land should be heard where the land is located, then most suits involving land

219. Tex. Civ. Stat. art. 1198(12) (1879).

220. *Gilbert v. Gilbert*, 145 Tex. 114, 118-19, 195 S.W.2d 936, 938 (1946). One who is not entitled to possession of any part of the property may not rely upon this subdivision. 1 R. McDONALD, *supra* note 63, § 4.21.

221. TEX. REV. CIV. STAT. ANN. art. 1995(13) (Vernon 1964). The difficulties are compounded under these two seemingly conflicting provisions when the plaintiff sues a defendant in the county of the defendant's residence and no part of the property is located in that county, and when personal property is involved. In either of these situations the plaintiff must additionally demonstrate by extrinsic evidence that the defendant who asserts an interest in or adverse claim to the personal property resides in the county of alleged venue. *Thompson v. Pure Oil Co.*, 113 S.W.2d 662, 666 (Tex. Civ. App.—Texarkana 1937, no writ). If real property is involved, the plaintiff need only demonstrate by extrinsic evidence that a defendant resides in the county of suit, and that the action does not involve a controversy as to the title. 1 R. McDONALD, *supra* note 63, § 4.21, at 485.

222. *Gilbert v. Gilbert*, 145 Tex. 114, 119-20, 195 S.W.2d 936, 939 (1946); *see* *Herrington v. McDonald*, 141 Tex. 441, 445, 174 S.W.2d 307, 309 (1943); *Pena v. Sling*, 135 Tex. 200, 213, 140 S.W.2d 441, 447 (1940).

223. 1 R. McDONALD, *supra* note 63, § 4.21. The result of this judicial interpretation is that a plaintiff

no longer can know in advance of suit whether he can maintain his partition action, involving land located in county A, in a court of county B where a defendant resides. Since he must, if the defendant questions the venue, prove that there is *no* controversy as to title, it is insufficient for him to establish by a preponderance of the evidence that he is entitled to the interest he asserts, or that the defendant has no valid claim to a greater share than plaintiff has conceded in his petition.

Id.

should be heard where the land is located. Subdivision 13, therefore, is not justified; it is redundant in light of subdivision 10 (suits dealing with personal property) and subdivision 14 (suits for land). Furthermore, subdivision 13 requires the plaintiff to prove a negative fact regarding partition of real property to come within the venue exception; that is, the plaintiff must prove that no title dispute exists. Requiring a party to establish facts in the negative, prior to a trial on the merits, is too complex an issue at this early stage of the proceedings. The question is simply where should the trial be held. This unexplained shifting of the normative burden of proof is unjustified.

*Article 1995(14): Lands*²²⁴

Subdivision 14 requires that suits involving disputes over land title, damages to land, or suits to prevent or stay waste be heard in the county where the land is located. This exception has its origin in the early venue statute of the Republic of Texas, although it was initially framed in a simpler form mentioning only controversies where "land is the object of the suit."²²⁵ The legislative addition of the word "damages" to land refers to an injury as to the possession of the land or to the freehold or estate.²²⁶ Prior to the revised statutes, only suits that could be maintained as actions for trespass to try title could be brought under this subdivision.²²⁷ By broadening the application of subdivision 14 to other types of disputes, the legislature intended to provide for venue exceptions in all cases where the title to land is in controversy.²²⁸

To qualify for this exception, the plaintiff must establish that the suit is for the recovery of lands or damages thereto and that a part of the land lies in the county of suit.²²⁹ While the location of the land in controversy requirement has not produced a large number of subdivision 14 cases, the requirements regarding the nature of the suit have caused much perplexity.²³⁰ In framing subdivision 14, the legislature chose to include five specific types of actions regarding land disputes. These include suits for recovery of land for damage to lands, to remove incumbrances upon land titles, to quiet title to land, and to prevent or stay waste to land. Each one

224. TEX. REV. CIV. STAT. ANN. art. 1995(14) (Vernon 1964); see 1 R. McDONALD, *supra* note 63, §§ 4.22.1-.7; B. MCELROY, *supra* note 36, § 684; Keith, *supra* note 63, at J-23.

225. 1836 Tex. Gen. Laws, *supra* note 19, 1 H. GAMMEL, LAWS OF TEXAS 1258 (1898).

226. Miller v. Rusk, 17 Tex. 170, 171 (1856).

227. 1 J. SAYLES, TEXAS CIVIL PRACTICE § 235 (1896); see Hearst's Heirs v. Kuykendall's Heirs, 16 Tex. 327 (1856); Miller v. Rusk, 17 Tex. 170 (1856); Morris v. Runnels, 12 Tex. 175 (1854).

228. 1 J. SAYLES, *supra* note 227, § 235; see Thomson v. Locke, 66 Tex. 383, 388, 1 S.W. 112, 115 (1886).

229. Piazza v. Phillips, 153 Tex. 115, 117, 264 S.W.2d 428, 429 (1954); Cowden v. Cowden, 143 Tex. 446, 451, 186 S.W.2d 69, 71 (1945). The nature of the suit is determined by reference to the petition. Renwar Oil Corp. v. Lancaster, 154 Tex. 311, 312, 276 S.W.2d 774, 775 (1955). Plaintiff need not establish by extrinsic evidence his interest or title. Cowden v. Cowden, 143 Tex. 446, 449, 186 S.W.2d 69, 72 (1945); cf. TEX. REV. CIV. STAT. ANN. art. 1995(13) (Vernon 1964); *supra* notes 215-23 and accompanying text.

230. B. MCELROY, *supra* note 36, § 684, at 462.

of these specific terms has spawned numerous cases as Texas appellate courts are forced to decide whether the nature of a particular suit is included within this statutory language.²³¹ Conflicting case law can be found for each cause of action listed in subdivision 14.²³² The statute need not be so specific in detailing the types of actions to which it will apply. Such specificity serves only to give ammunition to the resourceful plaintiff's attorney as he shapes his pleadings to match the terms of subdivision 14 in an attempt to sue a defendant in a county other than the defendant's domicile.

Additionally, under the damage to lands language, the courts have held that subdivision 14 is applicable to suits for damages to improvements placed on the land.²³³ One Texas appellate court has ruled that this language includes damages allegedly done to the roof of a house by a repair company.²³⁴ This case illustrates how the venue decisions have overlapped in application so that the prudent plaintiff's litigator will allege venue based on as many exceptions as possible to preserve potential arguments should appeal be necessary.²³⁵ The plaintiff in this lawsuit could have relied on subdivision 9a (negligence) or subdivision 23 (county where cause of action or part thereof arose). The plaintiff obviously chose subdivision 14 because it was easier to prove. The case law under heavily litigated subdivisions such as subdivision 14 invariably offers some precedent to support an appeal.

Another area of conflict involving subdivision 14 is exemplified by *Brown v. Gulf Television Co.*,²³⁶ where the plaintiff sought an injunction to remove a television antenna from his neighbor's land. The plaintiff claimed that his own land, which he used as an airport, was damaged by the presence of the defendant's tall antenna. According to the court, the venue issue was to determine the primary purpose of the suit. If the suit was to recover for damages to the plaintiff's land, then subdivision 14 would be relied upon to determine venue. If, however, the primary purpose of the suit was to obtain an injunction to force the removal of the antenna, then the Texas jurisdiction for trial injunction statute, article 4656, would fix the place of venue.²³⁷ The court was forced to examine the plaintiff's claim to decide whether a legal remedy of damages or an equita-

231. See 1 R. McDONALD, *supra* note 63, §§ 4.22.2-6; B. MCELROY, *supra* note 36, § 684, at 462-65.

232. See, e.g., the annotated cases cited at TEX. REV. CIV. STAT. ANN. art. 1995(14) (Vernon 1964 & Supp. 1982).

233. *Calvert v. Welch*, 369 S.W.2d 840, 842 (Tex. Civ. App.—Texarkana 1963, no writ).

234. *Perma Seal of Texas, Inc. v. Lovelace*, 518 S.W.2d 447, 448 (Tex. Civ. App.—Waco 1975, no writ).

235. The writer once represented an architect sued in a negligence action for negligent design of a school building. The school building had been damaged by fire, allegedly as a result of the negligence of the architect. Plaintiff maintained venue in this negligence action in the county of suit because the school building was located in the county of suit.

236. 306 S.W.2d 706 (Tex. 1957).

237. TEX. REV. CIV. STAT. ANN. art. 4656 (Vernon 1964). Note that subdivision 30 of the venue statute gives precedence to statutes outside the venue statute in which venue is expressly provided. *Id.* art. 1995(30).

ble remedy of injunction was sought by the plaintiff. In *Brown* the Texas Supreme Court expressed its support for this type of venue hair-splitting: "[I]t may seem that no venue distinction between remedies should logically be drawn if convenience of trial for litigants and witnesses be the true basis of the venue exception, but the Legislature has expressly provided a special venue for injunction suits . . ."²³⁸

The *Brown* problem will persist as long as mandatory venue subdivisions exist in article 1995 and the legislature enacts conflicting mandatory venue provisions in other statutes. The problem is to determine which mandatory provision should prevail when conflict between the two occurs. The Texas Supreme Court in *Brown* was correct in observing that no rational venue distinction could be drawn between remedies. Since any distinction drawn between remedies should have little to do with the principles underlying venue fairness, the court could have left the problem of resolving direct venue conflicts as a discretionary matter for trial judges based upon the venue considerations discussed *infra*.

*Article 1995(15): Breach of Title Warranty*²³⁹

Subdivision 15 authorizes the plaintiff to sue any seller of land for breach of title warranty in the seller's county of residence, and to join all other sellers who would be liable in the same suit. This is true regardless of the respective counties of residence of the other sellers. The legislature added this exception in 1887,²⁴⁰ and it can only be considered as an example of needless tinkering with the venue statute. Subdivision 15 is in essence merely a joinder provision serving the same purpose as subdivision 4.²⁴¹ Moreover, the original legislative purpose for it is unknown. Subdivision 15 is therefore unnecessary.

*Article 1995(16): Divorce*²⁴²

Subdivision 16 sets out the residency requirements of the plaintiff in suits for divorce and establishes venue based upon those residency requirements. The ancestor of this exception was the Republic of Texas law specifying residency requirements in divorce suits.²⁴³ This law was amended in 1873 and was placed in the venue statute by the codifiers of the first Revised Civil Statutes in 1879.²⁴⁴ Subdivision 16 has been superseded, however, by the 1973 Family Code, which contains differing residency re-

238. *Brown v. Gulf Television Co.*, 306 S.W.2d 706, 709 (Tex. 1957).

239. TEX. REV. CIV. STAT. ANN. art. 1995(15) (Vernon 1964); see 1 R. McDONALD, *supra* note 63, § 4.23; B. McELROY, *supra* note 36, § 685; Keith, *supra* note 63, at J-23.

240. 1887 Tex. Gen. Laws, ch. 88, § 1, at 69, 9 H. GAMMEL, LAWS OF TEXAS 876 (1898).

241. *Id.*; see also Langley, *supra* note 24, at 559-60. Only six cases are annotated under this exception, with only four of those appeals occurring in this century.

242. TEX. REV. CIV. STAT. ANN. art. 1995(16) (Vernon Supp. 1982); see 1 R. McDONALD, *supra* note 63, § 4.24; B. McELROY, *supra* note 36, § 686; Keith, *supra* note 63, at J-24.

243. 1841 Tex. Gen. Laws, An Act Concerning Divorce and Alimony, § 11, at 21, 2 H. GAMMEL, LAWS OF TEXAS 485 (1898).

244. 1873 Tex. Gen. Laws, ch. 74, § 1, at 117, 7 H. GAMMEL, LAWS OF TEXAS 569 (1898).

quirements from those in the venue statute.²⁴⁵ As subdivision 30 of the venue statute provides that specific acts of the legislature that expressly specify venue will supersede the subdivisions of article 1995,²⁴⁶ subdivision 16 is superfluous and should be deleted.

*Article 1995(17): Injunctions*²⁴⁷

Subdivision 17 mandates that the plaintiff maintain a suit to enjoin the execution of a judgment or to stay proceedings in another suit in the county where the judgment was rendered or the other suit is pending. This exception to the general venue rule was added in the 1879 codification.²⁴⁸ Its ancestor is the Act Regulating Proceedings in the District Court of May 13, 1846.²⁴⁹ The issuance of injunctions, orders of mandamus, and other extraordinary writs were apparently areas much abused by early judges.²⁵⁰ Evidenced by the promulgation of special rules regarding extraordinary writs in 1841 and 1846, the legislature was concerned with the independence of frontier judges and their potential abuse of equitable powers.²⁵¹ The purpose of this subdivision is to unify in one court the proceedings regarding the subject matter of a suit. This purpose serves administrative convenience rather than the convenience of the parties.

The venue facts to be established by the plaintiff are that the nature of the suit (as determined by the plaintiff's pleadings) is covered by the exception and that the judgment or action attacked occurred or is pending in the county of suit.²⁵² The latter of these facts is usually within the court's knowledge. Thus, judicial notice may be taken of the fact.²⁵³

Subdivision 17 is identical in effect to article 4656 of the Texas statutes,²⁵⁴ which requires that writs of injunction to stay an execution of a judgment be returned to and tried in the court where the suit is pending or the judgment was rendered. Subdivision 30 of the general venue statute gives preference to article 4656 over subdivision 17 of article 1995.²⁵⁵ The venue subdivision is superfluous, as evidenced by the fact that the few

245. TEX. FAM. CODE ANN. § 3.21 (Vernon 1975).

246. TEX. REV. CIV. STAT. ANN. art. 1995(30) (Vernon 1964).

247. *Id.* art. 1995(17); see 1 R. McDONALD, *supra* note 63, § 4.25.1; B. McELROY, *supra* note 36, § 687; Keith, *supra* note 63, at J-25.

248. Tex. Civ. Stat. art. 1198(15) (1879).

249. 1846 Tex. Gen. Laws, An Act to Regulate Proceedings in the District Courts § 151, at 405, 2 H. GAMMEL, LAWS OF TEXAS 1711-12 (1898).

250. In the Act Regulating Proceedings in the District Courts, January 25, 1841, the legislature, in the midst of prescribing rules for injunction and mandamus actions, took the time to criticize the prior decisions of the supreme court that had allowed the district courts to issue peremptory mandamus orders after an *ex parte* hearing. 1841 Tex. Gen. Laws, An Act to Regulate the Granting on Trial of Injunctions, 2 H. GAMMEL, LAWS OF TEXAS 548 (1898).

251. For a discussion of subdivision 20 mandamus against heads of departments, see *infra* notes 279-89 and accompanying text.

252. 1 R. McDONALD, *supra* note 63, § 4.25.1, at 508.

253. *Id.*

254. TEX. REV. CIV. STAT. ANN. art. 4656 (Vernon 1964).

255. *Id.* art. 1995(30) (Vernon 1964). This provision gives preference to any statute specifically designating venue over the venue statute itself.

cases annotated under subdivision 17 of the venue statute invariably refer to article 4656 as a basis for venue.²⁵⁶ Subdivision 17 should thus be eliminated.

*Article 1995(17a): Labor Disputes*²⁵⁷

Subdivision 17a requires that a plaintiff file suit to enjoin unlawful labor activities in the county where the alleged unlawful action occurred. This exception is based upon the condition, however, that service can be had on the defendant. Otherwise, venue is to be found in the county of residence of the defendant or any one of the defendants, or in Travis County (when suit would be filed by the State of Texas as a party). The venue facts are based on the nature of the suit as shown by the pleadings of the plaintiff.

Subdivision 17a was originally added to article 1995 in 1955²⁵⁸ and was amended in 1969.²⁵⁹ The most significant change of the 1969 amendment made subdivision 17a mandatory rather than permissive. This change was in direct response to *Ex parte Egerly*,²⁶⁰ where an injunction against picketing in Jefferson County (the Beaumont area) was filed in Midland County. The picketers were cited for contempt by the Midland judge, arrested by the Midland County Sheriff, and held in the Midland County jail in west Texas. On writ of habeas corpus,²⁶¹ the Supreme Court of Texas ordered the strikers released. Subdivision 17a was not mentioned in the opinion; this abuse was legislatively cured, however, by making subdivision 17a mandatory. Subdivision 17a is aimed at a very specific type of action and is clearly a remedial measure better suited for inclusion in statutes dealing with labor relations rather than in the venue statute. An indication of the limited application of subdivision 17a is shown by noting that only one case is annotated under subdivision 17a in the statutes. In that case the plaintiff sought to use the subdivision to "strike" the trial judge from a case.²⁶² Subdivision 17a was there held to be clearly inapplicable.²⁶³ Consequently, the exception as to labor disputes has never been favorably asserted by plaintiffs on appeal. If such a policy-based venue provision is even wise, it certainly does not belong in the procedure-based provision of article 1995.

256. B. MCELROY, *supra* note 36, § 687, at 475.

257. TEX. REV. CIV. STAT. ANN. art. 1995(17a) (Vernon Supp. 1982); see 1 R. McDONALD, *supra* note 63, § 4.25.2; B. MCELROY, *supra* note 36, § 688; Keith, *supra* note 63, at J-25 to -26.

258. 1955 Tex. Gen. Laws, ch. 388, § 1, at 1031.

259. 1969 Tex. Gen. Laws, ch. 864, § 1, at 2606.

260. 441 S.W.2d 514 (Tex. 1969); see Keith, *supra* note 63, at J-26, n.142.

261. 441 S.W.2d at 514.

262. San Antonio Gen. Drivers, Local 657 v. Thornton, 156 Tex. 641, 299 S.W.2d 911 (1957).

263. *Id.* at 915.

*Article 1995(18): Probate Revision*²⁶⁴

Subdivision 18 provides that suits to revise probate proceedings of the county court must be brought in the state district court of the same county. The act that first contained a similar provision was passed in 1876.²⁶⁵ It was then reworded and codified in the general venue statute in 1879.²⁶⁶ The allegations in the plaintiff's petition are sufficient to determine the nature of the suit for purposes of subdivision 18.²⁶⁷

Subdivision 18 is a jurisdiction granting measure rather than a venue exception.²⁶⁸ It is a misplaced provision that should be removed from the venue statute²⁶⁹ and placed in the Probate Code, if indeed it is a necessary provision. Only three recent cases are annotated under this subdivision.²⁷⁰

*Article 1995(19): Suits Against Counties*²⁷¹

Subdivision 19 mandates that suits brought against a county must be brought in that county. In the 1846 act incorporating the counties of the then new State of Texas, the legislature included a provision requiring that suits against a county be brought within that specific county.²⁷² This provision was incorporated into the general venue statute in 1879.²⁷³ The purpose is clearly to further the administrative convenience of county officials²⁷⁴ because this mandatory provision extends beyond the venue privilege generally granted to defendants.

The sole venue fact needed to activate this exception, as shown from the plaintiff's petition, is that the suit is against a county or a county official acting in his official capacity.²⁷⁵ Subdivision 19 has been held to take precedence over other mandatory and permissive subdivisions of the general venue statute²⁷⁶ so that a county as defendant may not, for example, be

264. TEX. REV. CIV. STAT. ANN. art. 1995(18) (Vernon 1964); see 1 R. McDONALD, *supra* note 63, § 4.26; B. McELROY, *supra* note 36, § 689; Keith, *supra* note 63, at J-26.

265. 1876 Tex. Gen. Laws, ch. 84, §§ 128, 130, at 128, 8 H. GAMMEL, LAWS OF TEXAS 929, 964 (1898).

266. Tex. Civ. Stat. art. 1198(16) (1879).

267. Dowden v. Cannon, 480 S.W.2d 822, 824 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ *dism'd*).

268. 1 R. McDONALD, *supra* note 63, § 4.26, at 510; B. McELROY, *supra* note 36, § 689; Keith, *supra* note 63, at J-26.

269. B. McELROY, *supra* note 36, § 689.

270. McCarty v. Loftice, 587 S.W.2d 547 (Tex. Civ. App.—Dallas 1979, no writ); Deason v. Rogers, 499 S.W.2d 14 (Tex. Civ. App.—Corpus Christi 1973, writ *dism'd*); Dowden v. Cannon, 480 S.W.2d 822 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ *dism'd*).

271. TEX. REV. CIV. STAT. ANN. art. 1995(19) (Vernon 1964); see 1 R. McDONALD, *supra* note 63, § 4.27; B. McELROY, *supra* note 48, § 690; Keith, *supra* note 63, at J-26 to -27.

272. 1846 Tex. Gen. Laws, An Act to Incorporate the Several Counties of this State Which Now Exist, or which May be Hereafter Established § 4, at 321, 2 H. GAMMEL, LAWS OF TEXAS 1626 (1898).

273. Tex. Civ. Stat. art. 1198(17) (1879).

274. See Hodges v. Coke County, 196 S.W.2d 935, 937 (Tex. Civ. App.—Amarillo 1946, no writ); Montague County v. Meadows, 31 S.W. 694, 695 (Tex. Civ. App. 1895, writ *ref'd*).

275. Fielder v. Parker, 119 S.W.2d 1089, 1092 (Tex. Civ. App.—Eastland 1938, no writ); Cobb v. H.C. Burt & Co., 241 S.W. 185, 190 (Tex. Civ. App.—Beaumont 1922, no writ).

276. Randall County v. Todd, 542 S.W.2d 236, 238 (Tex. Civ. App.—Amarillo 1976, no writ). This rule can be logically inferred from State Board of Ins. v. Adams, 316 S.W.2d 773

joined in a suit maintainable outside the county under the joinder exception of subdivision 4. Although "[a] county is not of course an inhabitant and probably does not need the same protection that an individual might require,"²⁷⁷ counties are necessarily composed of the officials that bring them to life. County officials, like other individuals, deserve protection when acting in their official capacities.²⁷⁸

*Article 1995(20): Heads of Departments*²⁷⁹

Subdivision 20 commands that all suits for mandamus against heads of state government departments be brought in Travis County. Early Texas courts issued writs of mandamus against department heads of the Republic of Texas to compel them to act in favor of local petitioners.²⁸⁰ This was a favorite tactic against the Commissioner of the General Land Office, for example, to enforce the granting of lands.²⁸¹ District judges were apparently issuing these writs without notice or summons to the department heads; consequently, the legislature in 1841 felt compelled to prohibit the issuing of preemptory writs of mandamus after *ex parte* hearings.²⁸² In 1846 these provisions were carried over into the first act of the State of Texas organizing the district courts and defining their jurisdiction.²⁸³ This act provided that writs of mandamus were returnable before the district court of the county where the seat of government was located.²⁸⁴ This provision was codified in the general venue statute in 1879.²⁸⁵

The fact that the suit is against a government department head for mandamus is determined from the plaintiff's petition.²⁸⁶ Subdivision 20 is a mandatory provision²⁸⁷ and is applicable to mandamus actions only, not to suits for damages and injunction.²⁸⁸ The exception has little utility, because most department heads reside in Travis County. Consequently, under the general venue provision, suit would have to be filed there regardless of the status of the defendant as a governmental department head.

(Tex. Civ. App.—Houston 1958, no writ), and the fact that the entire venue scheme uses this rule whenever the nature of the suit at issue involves a government official acting in an official capacity.

277. B. McELROY, *supra* note 36, § 690, at 481.

278. *Id.*

279. TEX. REV. CIV. STAT. ANN. art. 1995(20) (Vernon 1964); see 1 R. McDONALD, *supra* note 63, § 4.28; B. McELROY, *supra* note 36, § 691; Keith, *supra* note 63, at J-27.

280. Houston Tap & Brazoria Ry. v. Randolph, 24 Tex. 317, 342-43 (1859).
281. Commissioner of the Gen. Land Office v. Smith, 5 Tex. 471 (1849). For an example of this early practice, see Board of Land Comm'rs v. Bell, Dallam 366 (1840).

282. 1841 Tex. Gen. Laws, An Act To regulate the Granting and Trial of Injunctions, and to empower the Judges of District Courts to submit issues of fact to a Jury in Chancery cases § 9, at 84, 2 H. GAMMEL, LAWS OF TEXAS 548 (1898).

283. 1846 Tex. Gen. Laws, An Act to Organize the District Courts and to Define their Powers and Jurisdiction § 4, at 201, 2 H. GAMMEL, LAWS OF TEXAS 1507 (1898).

284. *Id.*

285. Tex. Civ. Stat. art. 1198(17) (1879).

286. State Bd. of Ins. v. Adams, 316 S.W.2d 773 (Tex. Civ. App.—Houston 1958, no writ).

287. Lewis v. Gulf, C. & S.F. Ry., 229 S.W.2d 395, 397 (Tex. Civ. App.—Galveston 1950, writ *dism'd*) (*dictum*).

288. Sterrett v. Gibson, 168 S.W. 16, 17-18 (Tex. Civ. App.—San Antonio 1914, no writ).

The effect of this exception is further diminished by the fact that mandamus against state government department heads is not a common type of action.²⁸⁹ Thus, like so many of the other overly specific venue exceptions, subdivision 20 is largely ineffective and should be repealed.

*Article 1995(21): Corporation Charters*²⁹⁰

Subdivision 21 allows the State of Texas to maintain venue in Travis County in four types of suits: (1) suits against a domestic corporation for forfeiture of its charter; (2) suits against foreign corporations for cancellation of a permit to do business in Texas; (3) suits against any corporation for exercising powers not conferred by the state; and (4) suits against anyone engaging in business in the state contrary to law. Subdivision 21 is a combination of two earlier venue exceptions. The first dealt only with forfeiture of charters granted to corporations by the legislature,²⁹¹ and its origin was an 1876 act.²⁹² The second dealt with suits to forfeit the charters of corporations organized under the general incorporation laws of the state,²⁹³ an act originally passed in 1903.²⁹⁴ These two exceptions, numbered as subdivisions 21 and 22 in 1911,²⁹⁵ were combined in the revision of the Civil Statutes of 1925 to formulate what now reads in the venue statute as subdivision 21.²⁹⁶ State administrative convenience was the purpose for these measures specifying venue in Travis County. Subdivision 21 has been superseded by current provisions of the Texas Business Corporations Act, however, thus rendering the exception of doubtful relevance with regard to suits against foreign and domestic corporations.²⁹⁷ Thus, the subdivision could be deleted.

*Article 1995(22): Railway Lands*²⁹⁸

Subdivision 22 provides that for the state to recover when land was originally granted to a railroad by the State of Texas and those lands were fraudulently alienated by the railroad, venue must be maintained in Travis County. Subdivision 22 has never been used at the appellate level to de-

289. B. McELROY, *supra* note 36, § 691.

290. TEX. REV. CIV. STAT. ANN. art. 1995(21) (Vernon 1964); *see* 1 R. McDONALD, *supra* note 63, § 4.29; B. McELROY, *supra* note 36, § 692; Keith, *supra* note 63, at J-28.

291. Tex. Civ. Stat. art. 1198(19) (1879).

292. 1876 Tex. Gen. Laws, ch. 167, § 1, at 312, 8 H. GAMMEL, LAWS OF TEXAS 1148 (1898).

293. Tex. Rev. Civ. Stat. art. 1830(22) (1911).

294. 1903 Tex. Gen. Laws, ch. 92, § 1, at 118 (purporting to confer *jurisdiction* of these types of suits on the District Court of Travis County).

295. Tex. Rev. Civ. Stat. art. 1830(21), (22) (1911).

296. Tex. Rev. Civ. Stat. art. 1995(21) (1925).

297. Keith, *supra* note 63, at J-28 (citing TEX. BUS. CORP. ACT ANN. art. 7.03 (Vernon 1956) (regarding domestic corporations) & art. 8.16 (Vernon Supp. 1977) (regarding foreign corporations)). The cited articles of the Texas Business Corporation Act permit suits to be filed "either in the district court of the county in which the registered office of the corporation is situated, or in any district court of Travis county."

298. TEX. REV. CIV. STAT. ANN. art. 1995(22) (Vernon 1964); *see* 1 R. McDONALD, *supra* note 63, § 4.29; B. McELROY, *supra* note 36, § 693; Keith, *supra* note 63, at J-28.

termine venue, and future use of the exception is unlikely.²⁹⁹ The state has granted no lands to railroads since 1882,³⁰⁰ and the Texas Constitution requires that all land granted to a railroad must be alienated within twelve years.³⁰¹ Thus, the last of such lands should have been alienated by 1894.³⁰² In addition, as of August 5, 1969, Texas voters repealed the provisions of the state constitution dealing with railroad lands.³⁰³ This subdivision is consequently an anachronism and should be deleted.

*Article 1995(23): Corporations and Associations*³⁰⁴

Subdivision 23 allows suits against corporations³⁰⁵ and associations³⁰⁶ to be maintained in a number of alternative venues at the plaintiff's discretion, including: (1) the county in which the corporation's principal office is found; (2) the county where the cause of action or a part of the cause of action arose; (3) the county where the plaintiff resided at the time the cause of action arose if the corporation has an agent or representative in that county; or (4) the county nearest to the plaintiff's county of residence when the corporation did have an agent or representative at the time the cause of action arose, assuming that the corporation has no agent or representative in the plaintiff's resident county at the time the cause of action arose. Statutes dealing with corporations are of relatively recent origin since early corporation charters were granted directly by the sovereign. Venue in suits against private corporations was first established by the legislature in 1874 in substantially the same form as today.³⁰⁷ The limited liability of the

299. Langley, *supra* note 24, at 552.

300. 1882 Tex. Gen. Laws, ch. 6, § 1, at 3, 9 H. GAMMEL, LAWS OF TEXAS 263 (1898) (repealing the last railroad land grant law).

301. TEX. CONST. art. XIV, § 3 (1876, repealed 1969).

302. See Langley, *supra* note 24, at 551-52.

303. TEX. CONST. art. XIV, § 3 (1876, repealed 1969) (grants to railroad companies); TEX. CONST. art. XIV, § 5 (1876, repealed 1969) (forfeiture of lands granted to railroad companies).

304. TEX. REV. CIV. STAT. ANN. art. 1995(23) (Vernon 1964); see 1 R. McDONALD, *supra* note 63, §§ 4.29-30; B. McELROY, *supra* note 36, § 694; Keith, *supra* note 63, at J-29. The discussion of subdivisions 23, 24, 25, and 26 will follow the organization of Justice Keith's discussion in that the provisions in subdivision 23 dealing specifically with railroad corporations will be discussed in the ensuing portion of the text. The remainder of the text will discuss certain types of suits against railroads (subdivisions 25 and 26) and suits against common carriers in general (subdivision 24). Subdivision 23 was rewritten in 1943. Prior to that time, the statute made no distinction between domestic and foreign corporations. The 1943 amendment, however, was made applicable to foreign corporations and associations. Thus, foreign corporations and associations having a principal office or an agent in Texas are subject to two venue exceptions. 1 R. McDONALD, *supra* note 63, § 4.30.1.

305. This subdivision does not include domestic public or quasi-public corporations even though they have the elements of a private corporation. Texas Employers Ins. Ass'n v. Finch, 512 S.W.2d 51, 53 (Tex. Civ. App.—Tyler 1974, no writ).

306. Partnerships are considered to be "associations" under subdivision 23, although this was not true prior to the adoption of the Texas Uniform Partnership Act. TEX. REV. CIV. STAT. ANN. art. 6132b (Vernon 1970 & Supp. 1982). See, e.g., Hudgens v. Bain Equip. & Tube Sales, Inc., 459 S.W.2d 873, 875 (Tex. Civ. App.—Corpus Christi 1970, no writ).

307. 1876 Tex. Gen. Laws, ch. 34, § 1, at 32-33, 8 H. GAMMEL, LAWS OF TEXAS 34 (1898). Note that this act contains the words "cause of action." In Texas procedure this phrase has come to mean that to maintain venue the plaintiff must prove he has a cause of action. Conversely, the venue practice in 1874 put the burden on the defendant to negate

corporate form, plus the general public suspicion of corporate activities, led the legislature to benefit plaintiffs who seek to sue corporations. This exception was placed in the general venue statute in the codification of 1879.³⁰⁸

Each of the above alternatives requires a different combination of venue facts, but some common elements are required for any exception to be applicable. The plaintiff is required "both to plead specifically and to prove facts showing that a cause of action arose in [his] favor against the defendant."³⁰⁹ The plaintiff must of course allege that the defendant is a corporation, but actual proof is required only if the defendant denies the allegation in the plea of privilege.³¹⁰ The corporation's principal office is defined as the place or places designated in its charter as a principal office, or where the principal office is in fact located.³¹¹ If the plaintiff relies on the language in subdivision 23 regarding the county where the cause of action arose, the plaintiff must show that "either some part of the transaction creating the primary right, or some part of the transaction relating to the breach of that right, must have occurred in the county where the suit is brought."³¹² If, however, the plaintiff relies on the language in subdivision 23 regarding the county of the plaintiff's residence at the time the cause of action arose, then the plaintiff must establish his own residence in the county of suit, prove that the corporation has an agent or representative in that county,³¹³ and show by a preponderance of the evidence that the

the allegations of the petition in order to establish venue according to the general rule of venue in the defendant's domicile. Clearly, the 1874 legislature did not intend that proof of a cause of action by the plaintiff should be required to qualify for one of the enumerated venue exceptions. *See id.*

308. Tex. Civ. Stat. art. 1198(21) (1879).

309. *Victoria Bank & Trust Co. v. Monteith*, 138 Tex. 216, 223, 158 S.W.2d 63, 67 (1941). This statement is true except for the provision allowing suit to be brought in the county where the defendant's principal office is situated.

310. *Tri-Service Drilling Co. v. Adams*, 287 S.W.2d 711, 713 (Tex. Civ. App.—Amarillo 1956, no writ).

311. *Mobile County Mut. Ins. Co. v. Southern Agent Corp.*, 519 S.W.2d 186, 189 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ); *Magnolia Petroleum Co. v. Broussard*, 340 S.W.2d 366, 368 (Tex. Civ. App.—Beaumont 1960, writ *dism'd*).

312. *Stone Fort Nat'l Bank v. Forbess*, 126 Tex. 568, 572, 91 S.W.2d 674, 676 (1936). This means that a plaintiff must demonstrate by a preponderance of the evidence all elements of a cause of action. *Santleben v. Taylor-Evans Seed Co.*, 585 S.W.2d 784, 786 (Tex. Civ. App.—San Antonio 1979, no writ). Damages, however, are not part of the cause of action for purposes of venue. *Ben Griffin Tractor Co. v. Garza*, 497 S.W.2d 69, 71-72 (Tex. Civ. App.—Fort Worth 1973, no writ). Thus, the sustaining of damages in the county of suit is not sufficient to establish venue where the genesis and breach of the right occurred elsewhere. *Haden Co. v. Johns-Manville Sales Corp.*, 553 S.W.2d 759, 759 (Tex. 1977) (*per curiam*). This rule, however, does not appear to apply in a strict liability tort case. No cause of action for venue purposes in such a case exists until actual physical harm has occurred to person or property. *Lubbock Mfg. Co. v. Sames*, 598 S.W.2d 234, 237 (Tex. 1980).

313. *Milligan v. Southern Express, Inc.*, 151 Tex. 315, 316-17, 250 S.W.2d 194, 194 (1952); *Humble Oil & Ref. Co. v. Preston*, 487 S.W.2d 956, 957 (Tex. Civ. App.—Beaumont 1972, writ *dism'd*). In this portion of subdivision 23 and in the following portion, the locality in which the cause of action arose is irrelevant. *Texas-Louisiana Power Co. v. Wells*, 121 Tex. 397, 399, 48 S.W.2d 978, 979 (Tex. Comm'n App. 1932, judgment adopted).

plaintiff possesses a cause of action.³¹⁴ Finally, if the plaintiff relies on the language in subdivision 23 providing that suit may be maintained in the county nearest the plaintiff's county of residence at the time the cause of action arose, the plaintiff must prove the existence of an agent or representative in the county nearest the plaintiff's county of residence at the time the cause of action arose, and the plaintiff's possession of a cause of action.³¹⁵

A look at the maze of venue facts under subdivision 23 indicates that this exception is an unwieldy law.³¹⁶ Additional diverse elements that the plaintiff must prove under the subdivision include the date when the cause of action arose, the county where the plaintiff resided when the cause of action arose, the elements of the cause of action, and issues concerning when a person is an agent or representative as opposed to a mere servant or employee of the corporate entity.³¹⁷ This complicated optional venue structure has engendered frequent litigation.³¹⁸ In addition, the terms used in subdivision 23 are given different meanings for venue purposes than the meanings given to the same terms in a trial on the merits.³¹⁹ For example, in *Milligan v. Southern Express, Inc.*³²⁰ The Supreme Court of Texas acknowledged this denotative distinction:

[T]he presence in the county of a mere servant, for example, a salaried employee to clean out dirty trailers, does not create there an agency for venue purposes, even though respondent *[sic]* superior would obviously apply. Conversely, the more or less permanent possession by a resident of the county of a broad power of attorney of the defendant might well make such a person an "agency or representative" even though his high position necessarily involved powers of discretion far beyond those of a servant and therefore similar to those of an independent contractor.³²¹

These inconsistencies in the law have been the genesis of many appellate cases as attorneys seek to define and apply otherwise familiar terms for venue purposes.

The requirement that the plaintiff prove a cause of action not only generates venue appeals, but more importantly it generates innumerable venue hearings on matters that have little, if any, relation to proper venue considerations. Proof of the entire cause of action, not merely that part of

314. *La Jet, Inc. v. United Petroleum Distribs., Inc.*, 570 S.W.2d 192, 194 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ).

315. *Morris Plan Life Ins. Co. v. Wells*, 367 S.W.2d 410, 411 (Tex. Civ. App.—Fort Worth 1963, no writ); *Duncan Coffee Co. v. Clement*, 246 S.W.2d 509, 511 (Tex. Civ. App.—Fort Worth 1952, no writ).

316. See Langley, *supra* note 24, at 561.

317. *Id.*

318. See, e.g., the cases annotated in TEX. REV. CIV. STAT. ANN. art. 1995(23) (Vernon 1964 & Supp. 1982).

319. B. McELROY, *supra* note 36, § 694, at 493. See the discussion of subdivision 5, *supra* notes 113-14 and accompanying text.

320. 151 Tex. 315, 250 S.W.2d 194 (1952).

321. *Id.* at 322, 250 S.W.2d at 197.

the cause of action that arose in the county of suit, is required.³²² Each case with its distinct fact pattern presents different questions of proof for the trial court and different avenues of appeal for the disappointed litigator.

Finally, the requirement that an "agency or representative" exist in the county of suit has little bearing upon the question of the proper trial forum. If there is not a connection between the occurrence made the basis of the suit and the existence of the agency or representative, then the venue where an agency or representative exists is irrelevant. This is especially true when considered in light of the basic venue principles of convenience of the witnesses, the location of the evidence, and the convenience of the parties and the court.³²³

*Article 1995(23), (24), (25), and (26): Railroads and Common Carriers*³²⁴

Actions against railroads or other common carriers are considered in four subdivisions of article 1995, including the last portion of subdivision 23 and subdivisions 24, 25, and 26. Subdivision 23 allows suits against railroads to be maintained in any county where the railroad extends or is operated. Subdivision 24 is applicable to common carriers in general, specifying that suits against two or more carriers may be maintained in any county where one of the carriers does business. Subdivision 25 permits suits for personal injuries against railroads to be maintained in either the county where the injury occurred or in the county where the plaintiff resided at the time of injury. Subdivision 26 concerns suits for railroad wages and allows the employee to bring suit where the labor was performed, where the cause of action accrued, or at the location of the principal office of the railroad.

Most of these provisions are of late nineteenth century origin and indicate the suspicion with which the legislature viewed the railroads at that time. These specific enactments concerning railroads may have been a response to the perception that physical property damage might be done or wages left unpaid, leaving the injured citizen with no one to sue. This fear is exemplified by a 1905 law that allowed plaintiffs to serve process on the railroad by serving the conductor.³²⁵ No cogent reason can currently be given as to why carriers should be subject to different rules of venue than other corporations doing business in Texas. The venue provisions regarding corporations, negligence, written contracts, or breach of warranty would serve the same purposes as the provisions contained within these

322. *Employers Casualty Co. v. Clark*, 491 S.W.2d 661, 662 (Tex. 1973).

323. *Guittard & Tyler*, *supra* note 48, at 574. The same argument is of course applicable to the appropriate clause under subdivision 27. *See infra* notes 327-39 and accompanying text.

324. TEX. REV. CIV. STAT. ANN. art. 1995(23), (24), (25), (26) (Vernon 1964); *see* 1 R. McDONALD, *supra* note 63, § 4.31; B. McELROY, *supra* note 36, § 694, n.11, at 484 & §§ 695-697; Keith, *supra* note 63, at J-30 to -31.

325. 1905 Tex. Gen. Laws, ch. 25, § 2, at 29; Tex. Rev. Civ. Stat. art. 1962 (1911).

four subdivisions.³²⁶

*Article 1995(27): Foreign Corporations*³²⁷

The development of the venue provision dealing with foreign corporations is similar to the development of provisions pertaining to corporations and railroads. The first law specifying venue regarding foreign corporations was passed in 1887.³²⁸ This law was codified in the general venue statute in 1895.³²⁹

Subdivision 27 is similar to the first portion of subdivision 23 pertaining to corporations in that subdivision 27 provides that foreign corporations may be sued where their principal office is located or in the county where the cause of action arose.³³⁰ Under subdivision 27 foreign corporations are subject to suit in any county where the corporation has an agency or representative,³³¹ or in the plaintiff's county of residence if the foreign corporation has no agency or representative in the state. Moreover, if the plaintiff relies on these latter two requirements to maintain venue, no cause of action against the foreign corporation need be proven.³³² A cause of action need be proven against a foreign corporation only if the plaintiff relies on the language in subdivision 27 regarding the county where the cause of action accrued.³³³

The difference in treatment between resident corporations in subdivision 23 and nonresident corporations in subdivision 27 regarding proof of a cause of action subjects foreign corporation defendants to broader venue possibilities than domestic corporations.³³⁴ This unequal treatment has nevertheless been held to be constitutional by the Texas Supreme Court³³⁵ and by the United States Supreme Court.³³⁶ In response to this discrimi-

326. See B. MCELROY, *supra* note 36, § 695, at 494; Keith, *supra* note 63, at J-31; Langley, *supra* note 24, at 554-55 (commenting on subsection 25).

327. TEX. REV. CIV. STAT. ANN. art. 1995(27) (Vernon 1964); see 1 R. McDONALD, *supra* note 63, § 4.30.4; B. MCELROY, *supra* note 36, § 698; Keith, *supra* note 63, at J-32.

328. 1887 Tex. Gen. Laws, ch. 137, at 131, 9 H. GAMMEL, LAWS OF TEXAS 929 (1898).

329. Tex. Rev. Civ. Stat. art. 1194(25) (1895).

330. All elements of the cause of action must be established by a preponderance of the evidence. *General Motors Corp. v. Brady*, 477 S.W.2d 385, 390 (Tex. Civ. App.—Tyler 1972, no writ).

331. Under this clause, the defendant must have had an agent or representative in the county of suit at the time of the filing of the suit or at the time of the date of the hearing. 1 R. McDONALD, *supra* note 63, § 4.30.4. Thus the locality of the claim is irrelevant, as is the locality of the plaintiff's residence at the time the claim arose. *Texas-Louisiana Power Co. v. Wells*, 121 Tex. 397, 399, 48 S.W.2d 978, 979 (Tex. Comm'n App. 1932, judgment adopted).

332. *Maintenance & Equip. Contractors v. John Deere Co.*, 554 S.W.2d 28, 30-31 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ dismissed); *Hanover Ins. Co. v. Sanford*, 457 S.W.2d 115, 116 (Tex. Civ. App.—Beaumont 1970, no writ).

333. *Maintenance & Equip. Contractors v. John Deere Co.*, 554 S.W.2d 28, 30 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ dismissed).

334. See 1 R. McDONALD, *supra* note 63, § 4.30.1, at 514; B. MCELROY, *supra* note 36, § 698, at 497.

335. *Commercial Ins. Co. v. Adams*, 369 S.W.2d 927, 927 (Tex. 1963) (per curiam).

336. *American Motorists Ins. Co. v. Starnes*, 425 U.S. 637 (1976).

natory distinction,³³⁷ commentators have argued that no differentiation should be made between domestic and foreign corporations and have urged that the residence of any corporation should be the county where it maintains its principal place of business in the state.³³⁸ This writer agrees with this argument insofar as it extends. But questions still remain concerning what is to be done about foreign corporations with no place of business within this state. No rational basis can be found for a corporation without a place of business within the state to have any standing to contest venue unless that corporation can show that another county would better serve judicial economy and fairness. A foreign corporation simply has no standing to argue venue based upon its personal convenience. Consequently, foreign corporations without a place of business within the state should generally be subject to venue in any county within the state.³³⁹

*Article 1995(28): Insurance*³⁴⁰

The original version of subdivision 28 is found in an act passed by the legislature in 1874.³⁴¹ This act duplicates in part an earlier provision of the same legislature regarding venue in suits against specified private corporations.³⁴² This duplication indicates that some legislators wanted to be sure that suits involving claims against insurance companies were covered by the statutes. No other rationale can explain this complicated measure, which distinguishes as to venue between certain types of corporations. These overlapping laws were codified in the general venue statute in the 1879 revision.³⁴³

Subdivision 28 is composed of two separate sentences that deal with two types of insurance companies. The first sentence deals with fire, marine, or inland insurance companies. It allows suit to be maintained in the county where the insured property was situated. The second sentence of subdivision 28 refers to life insurance companies, accident insurance companies, life and accident insurance companies, health and accident insurance companies, and life, health, and accident insurance companies. It provides that venue may be maintained: (1) where the company's home office is located; (2) where the loss occurred; or (3) where the policyholder or beneficiary resides.

337. *Hanover Ins. Co. v. Sanford*, 457 S.W.2d 115, 119 (Tex. Civ. App.—Beaumont 1970, no writ) (Keith, J., concurring).

338. *Guittard & Tyler*, *supra* note 48, at 581-83.

339. Foreign corporations are subject to the provisions of subdivision 23 as well as those of subdivision 27, although the plaintiff's burden to establish venue is significantly diminished under subdivision 27. 1 R. McDONALD, *supra* note 63, § 4.30.1, at 514; B. McELROY, *supra* note 36, § 698, at 497. Consequently, any criticisms applicable to subdivision 27 are likewise applicable to subdivision 23.

340. TEX. REV. CIV. STAT. ANN. art. 1995(28) (Vernon 1964); see 1 R. McDONALD, *supra* note 63, § 4.33; B. McELROY, *supra* note 36, § 699; Keith, *supra* note 6, at J-32.

341. 1874 Tex. Gen. Laws, ch. 87, § 1, at 107-08, 8 H. GAMMEL, LAWS OF TEXAS 109-10 (1898).

342. *Id.* ch. 34, § 1, at 31-32, 8 H. GAMMEL, LAWS OF TEXAS 33-34 (1898).

343. Tex. Civ. Stat. art. 1198(22) (1879).

The venue facts differ under the two parts of subdivision 28. Plaintiffs who rely on the first sentence of subdivision 28 must only show that the company is a fire, marine, or inland insurance company and that the insured property was situated in the county of suit.³⁴⁴ If the plaintiff seeks to maintain venue under the second sentence of subdivision 28, the plaintiff's burden is increased. The venue facts required under the latter provision are that: (1) the plaintiff is a policyholder or beneficiary; (2) he resides in the county of suit; or, as an alternative to (1) and (2), (3) that the loss occurred in the county of suit; (4) the defendant is an insurance company of the type named in the exception; and (5) the plaintiff is suing on an insurance policy.³⁴⁵ The Texas Supreme Court has judged that the second sentence of subsection 28 applies to "suits on policies," that is, actions for enforcement of policies for what is due and payable under a policy. The latter portion of subdivision 28 thus has no applicability to suits "arising out of the policy," such as actions for the value of a policy or for the return of premiums paid.³⁴⁶ In addition, the Texas Supreme Court has decided that subdivision 28 is inapposite to automobile insurers.³⁴⁷

No adequate justification exists for a statutory distinction in venue requirements between types of insurance companies.³⁴⁸ Moreover, the distinction has caused anomalous results. For example, the requirement in the second sentence of subdivision 28 that the plaintiff be a policyholder or beneficiary is not a requirement for maintaining venue under the first sentence of subdivision 28. This has caused some plaintiffs to lose the benefit of the latter subdivision based upon their failing to prove that they were indeed policyholders.³⁴⁹ Such a result cannot be justified on any basis. The legislature's insistence upon differentiating between insurance companies remains a mystery with no rational basis upon which to rest this distinction. Consequently, the distinction must fall.

344. *Houston Gen. Lloyds Ins. Co. v. Stricklin*, 538 S.W.2d 178, 179 (Tex. Civ. App.—Dallas 1976, writ *dism'd*). In an action on a fire insurance policy, one court has held that providing the property was covered by the policy is not necessary in a venue hearing. *McKinney v. Calvert Fire Ins. Co.*, 257 S.W.2d 452, 454 (Tex. Civ. App.—Eastland 1953, mand. *overr.*).

345. *National Life Co. v. Rice*, 140 Tex. 315, 320, 167 S.W.2d 1021, 1024 (1943); *Employers Nat'l Ins. Co. v. Harkness*, 497 S.W.2d 645, 647 (Tex. Civ. App.—El Paso), *writ ref'd n.r.e. per curiam*, 502 S.W.2d 670 (Tex. 1973); *Great Southwest Life Ins. Co. v. Camp*, 464 S.W.2d 702, 703-04 (Tex. Civ. App.—Fort Worth 1971, no writ). The nature of the suit is determined from the plaintiff's pleadings. *Commercial Standard Ins. Co. v. Caylor*, 333 S.W.2d 161, 163 (Tex. Civ. App.—Austin 1960, no writ). The plaintiff is not required under this exception, however, to prove a cause of action. *Mercury Life & Health Co. v. Edgar-Renegar-Campbell Clinic & Hosp.*, 287 S.W.2d 231, 233 (Tex. Civ. App.—Amarillo 1956, writ *dism'd*); *American Casualty & Life Co. v. Robinson*, 220 S.W.2d 204, 208 (Tex. Civ. App.—El Paso 1949, writ *ref'd n.r.e.*).

346. *National Life Co. v. Stegall*, 140 Tex. 554, 559, 169 S.W.2d 155, 157 (1943).

347. *Pioneer Casualty Co. v. Johnson*, 450 S.W.2d 64, 65 n.2 (Tex. 1970); *see also Dairyland County Mut. Ins. Co. v. Morales*, 534 S.W.2d 383, 386 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ); *Centennial Ins. Co. v. Cantu*, 482 S.W.2d 349, 349 (Tex. Civ. App.—Eastland 1972, no writ).

348. B. McELROY, *supra* note 36, § 699, at 502.

349. *Houston Gen. Lloyds Ins. Co. v. Stricklin*, 538 S.W.2d 178, 179 (Tex. Civ. App.—Dallas 1976, writ *dism'd*).

*Article 1995(28a): Fraternal Benefit Societies and Statewide Mutual Assessment Companies*³⁵⁰

Subdivision 28a allows suits against specified insurance groups to be maintained in the county of the plaintiff's residence, in the county where the defendant's principal office is located, or in the county where the cause of action arose. The venue facts the plaintiff must prove to rely upon this subdivision include: (1) the nature of the suit as growing out of or based upon a contract of insurance; (2) the type of company involved; and (3) either the county of the plaintiff's residence, the county of the defendant's principal office, or the county where the cause of action arose.³⁵¹ Added in 1933,³⁵² subdivision 28a seems to be a legislative afterthought designed to address a perceived need to provide a forum for litigation against the specified insurance groups.

Subdivision 28a is clumsily worded. On its face it appears to apply to all types of contracts entered into by these insurance companies, but the courts have decided that the exception applies only to insurance contracts.³⁵³ In addition, as was emphasized in the discussion of subdivision 28, no reason exists for treating various types of insurance companies differently for venue purposes. Neither is there any reason why insurance companies in general should be treated differently from other corporations.³⁵⁴ Similarly, there is no reason why insurance companies covered by subdivision 28a should be subjected to broader venue provisions than are other insurance companies under the latter portion of subdivision 28.³⁵⁵ Furthermore, subdivisions 28 and 28a have to some degree been superseded by the Texas Insurance Code. The Insurance Code provides an analogous but narrower venue article relating to certain specified insurance companies. The narrower insurance venue provisions permit the location of trial as to claims for benefits to be maintained at the defendant's principal office or where the policyholder or beneficiary resides.³⁵⁶ Consequently, since no rational basis exists for distinguishing between the various types of insurance companies, and subdivision 28a may very well be superseded by certain venue provisions articulated by the Insurance Code, exception 28a should be deleted.

The policy behind these exceptions to the basic venue provision as to corporate entities in general may be fair since policyholders should not be required to bring suit where the insurance company has its principal office, or alternatively to prove the residence or agency of the company to main-

350. TEX. REV. CIV. STAT. ANN. art. 1995(28a) (Vernon 1964); *see* 1 R. McDONALD, *supra* note 63, § 4.34; B. MCELROY, *supra* note 36, § 700; Keith, *supra* note 63, at J-33.

351. National Mut. Benefit Ass'n v. Maggard, 161 S.W.2d 142, 143 (Tex. Civ. App.—Texarkana 1942, no writ); National Aid Life v. Self, 140 S.W.2d 606, 607 (Tex. Civ. App.—Eastland 1940, no writ).

352. 1931 Tex. Gen. Laws, ch. 150, § 1, at 251.

353. Tidelands Life Ins. Co. v. Armstrong, 414 S.W.2d 196, 198 (Tex. Civ. App.—Austin 1967, no writ).

354. B. MCELROY, *supra* note 36, § 700, at 505.

355. *Id.*

356. TEX. INS. CODE ANN. art. 14.35 (Vernon 1981).

tain venue.³⁵⁷ This consideration, however, does not justify the differing treatment of insurance companies based on their form of organization. Based on these principles of fairness, one general exception should apply to all insurance companies, or there should be no exception at all.

*Article 1995(29): Libel or Slander*³⁵⁸

Subdivision 29 provides that suits for libel or slander shall be maintained in the county where the plaintiff resided at the time the cause of action accrued, in the county where the defendant resided at the time of filing suit, or in the county of any defendant's residence or the domicile of any defendant corporation. This exception is based on a 1919 law³⁵⁹ designed to curb the then existing practice that allowed the plaintiff in libel and slander cases wide latitude in selecting venue. This practice was especially onerous when the alleged libel occurred in a widely distributed publication.³⁶⁰ Although the 1919 statute precluded the plaintiff from arbitrarily selecting venue to obtain an advantage over the defendant,³⁶¹ enterprising plaintiffs' attorneys nevertheless abused the law. The current subdivision 29 was enacted to abrogate that abuse.

The venue facts the plaintiff must prove when seeking to maintain venue at his county of residence at the time the cause of action accrued include that a cause of action for defamation has accrued, that the cause of action accrued on a certain date, and that the plaintiff resided in the forum county on that date.³⁶² To maintain suit in the county of residence of one defendant against a plea of privilege filed by another defendant who does not reside in that county, the plaintiff must prove by a preponderance of the evidence that a cause of action accrued against the nonresident defendant (a greater burden than the joinder provision of subdivision 4) and that a defendant who is a properly joinable party resides in the county of suit.³⁶³

The policy behind the libel exception to the basic venue rule is based on the belief that the plaintiff should be allowed to clear his name of the defamation in the county of the plaintiff's residence, among people who know

357. Langley, *supra* note 24, at 566.

358. TEX. REV. CIV. STAT. ANN. art. 1995(29) (Vernon 1964); see 1 R. McDONALD, *supra* note 63, § 4.35; B. McELROY, *supra* note 36, § 701; Keith, *supra* note 63, at J-33 to -34.

359. 1919 Tex. Gen. Laws, ch. 87, § 1, at 138.

360. Plaintiff could bring suit in any county where the libel was circulated. A.H. Belo & Co. v. Wren, 63 Tex. 686, 721 (1884); Bailey v. Chapman, 38 S.W. 544, 546 (Tex. Civ. App. 1897, no writ).

361. Light Publishing Co. v. Wurzbach, 266 S.W. 188, 190 (Tex. Civ. App.—San Antonio 1924, no writ).

362. General Motors Acceptance Corp. v. Howard, 487 S.W.2d 708, 710 (Tex. 1972); A.H. Belo Corp. v. Blanton, 133 Tex. 391, 396, 129 S.W.2d 619, 622 (1939). Plaintiff has the burden of proving at the venue hearing that the cause of action for defamation in fact accrued. Hornby v. Hunter, 385 S.W.2d 473, 474 (Tex. Civ. App.—Corpus Christi 1964, no writ); Lyle v. Waddle, 144 Tex. 90, 92, 188 S.W.2d 770, 771 (1945). For a landmark case concerning a suit against a corporation because of defamation by its agent, see Texam Oil Corp. v. Poynor, 436 S.W.2d 129 (Tex. 1968).

363. 1 R. McDONALD, *supra* note 63, § 4.35, at 543.

the plaintiff best.³⁶⁴ If this policy is a wise one, then it is overburdensome to require the plaintiff to prove the elements of the cause of action and the place of his residence at the time the cause of action accrued. The requirement of proof of a cause of action is never appropriate in a venue hearing because this matter should be left to a trial on the merits. The requirement of proof of the plaintiff's residence at the time the cause of action accrued is superfluous because few if any plaintiffs will change their residences after a cause of action accrues in order to bring the suit in another county. The complicated joinder provision of subdivision 29 is likewise redundant since the existing joinder provision of subdivisions 4 and 29a will serve the same purpose.³⁶⁵

*Article 1995(29a): Two or More Defendants*³⁶⁶

Subdivision 29a is a permissive joinder provision allowing the plaintiff to join all defendants who are necessary parties in a single suit if venue can be maintained against any one of the defendants. This exception to the venue rule was added to the venue statute in 1927³⁶⁷ to remedy a defect in the existing venue statute. Before subdivision 29a was enacted, the plaintiff was forced to rely on subdivision 4 to join multiple defendants. This reliance meant that unless the plaintiff sued the defendants in the county of residence of one of the defendants (a situation clearly within the bounds of subdivision 4), he had to establish some other subdivision within the statute against each of the defendants to maintain venue against all defendants.³⁶⁸ Subdivision 29a was added to lighten this heavy burden and to benefit the plaintiff.³⁶⁹

Subdivision 29a applies only when no defendant resides in the county of suit.³⁷⁰ Because this exception is always considered in conjunction with another subdivision of article 1995,³⁷¹ the required venue facts for application of subdivision 29a will vary depending on the companion provision. In all cases, however, the plaintiff must show that the defendants who are to be joined are necessary parties to the suit.³⁷² In other words, if the plaintiff can establish that one exception applies against one defendant, then all other defendants can be kept in the county of suit if they are necessary parties. The test of whether a defendant is a necessary party, however, has

364. Langley, *supra* note 24, at 556; *see* Houston Printing Co. v. Tennant, 120 Tex. 539, 545, 39 S.W.2d 1089, 1091 (1931).

365. Langley, *supra* note 24, at 557; *cf.* 1 R. McDONALD, *supra* note 63, § 4.35, at 543. McDonald relies on the fact that subsection 29 is mandatory to say that the joinder will be different and the various joinder provisions can thus be justified.

366. TEX. REV. CIV. STAT. ANN. art. 1995(29a) (Vernon 1964); *see* 1 R. McDONALD, *supra* note 63, § 4.36; B. McELROY, *supra* note 36, § 702; Keith, *supra* note 63, at J-34.

367. 1927 Tex. Gen. Laws, ch. 72, § 2, at 197.

368. 1 R. McDONALD, *supra* note 63, § 4.10.1, at 433; *see* Pioneer Bldg. & Loan Ass'n v. Gray, 132 Tex. 509, 514, 125 S.W.2d 284, 287 (1939).

369. 1 R. McDONALD, *supra* note 63, § 4.10.1, at 433.

370. Houseman v. Mahin, 390 S.W.2d 732, 734 (Tex. 1965).

371. Schulz v. Schulz, 478 S.W.2d 239, 242 (Tex. Civ. App.—Dallas, 1972, no writ); Kain v. Northland Ins. Co., 472 S.W.2d 304, 306 (Tex. Civ. App.—Amarillo 1971, no writ).

372. Ladner v. Reliance Corp., 156 Tex. 158, 162, 293 S.W.2d 758, 762 (1956).

caused much litigation. The Texas Supreme Court has defined a necessary party as one whose joinder in the suit "must be necessary in order to afford plaintiff the complete relief to which it is entitled."³⁷³ Moreover, the plaintiff must not only allege in the petition that the defendant is a necessary party, he must prove by extrinsic evidence the facts that make the defendant a necessary party before subdivision 29a is applicable.³⁷⁴

The requirement in subdivision 29a that the nonresident defendants be necessary parties to the suit has generated two problems. First, the interpretation of who is a necessary party produces much litigation even though the Supreme Court of Texas has ruled frequently on the matter.³⁷⁵ Second, the necessary party requirement causes fragmentation of litigation. Because subdivision 29a can only be used when no defendant resides in the county of suit, if the plaintiff fails to prove that the defendants are necessary parties, then the actions against the defendants who have filed pleas of privilege to contest venue are automatically transferred to their counties of residence.³⁷⁶ Thus, similar cases based on similar facts are subject to repetitious trials in scattered forums.³⁷⁷ One possible resolution to this problem might be to dismiss the suit entirely when a plea of privilege is sustained and allow the plaintiff a grace period, not subject to the statute of limitations, to refile in a proper county where venue might be maintained against all defendants.³⁷⁸ This solution, however, would only have a band-aid effect. Another possible resolution to the problem is to abolish the necessary party requirement of subdivision 29a and to allow joinder of parties for venue purposes to be governed by the joinder provision in the Texas Rules of Civil Procedure.³⁷⁹ Because the Texas Rules of Civil Procedure³⁸⁰ provide for joinder of parties, the venue statute should be reconciled with the rules. No justification exists as to why joinder for venue purposes based on the residence of one of the defendants in the county of

373. *Loop Cold Storage Co. v. South Tex. Packers, Inc.*, 491 S.W.2d 106, 108 (Tex. 1973).

374. *Ladner v. Reliance Corp.*, 156 Tex. 158, 165, 293 S.W.2d 758, 764 (1956).

375. *See, e.g., Loop Cold Storage Co. v. South Tex. Packers, Inc.*, 491 S.W.2d 106, 108 (Tex. 1973). The annotations in the *Texas Digest* contain 24 cases since the *Loop* decision where courts of civil appeals have found it necessary to apply the definition. Apparently, the *Loop* decision has not made the matter crystal clear to the lawyers of the state. *See* 37A TEX. DIG. § 22(4) (Supp. 1981).

376. *See Loop Cold Storage Co. v. South Tex. Packers, Inc.*, 491 S.W.2d 106, 109 (Tex. 1973); *Belcher v. Ramirez*, 578 S.W.2d 491, 494 (Tex. Civ. App.—Corpus Christi 1979, no writ); *C. Hayman Constr. Co. v. American Indem. Co.*, 473 S.W.2d 62, 70 (Tex. Civ. App.—Dallas 1971, no writ), *on certified questions*, 471 S.W.2d 564, 566 (Tex. 1971).

377. The *Loop* court explicitly recognized this problem when it observed that "[t]his is one controversy which perhaps could most fairly and expeditiously be tried as one lawsuit. But the Texas venue law does not leave our decision to considerations of better administration of justice." 491 S.W.2d at 108.

378. One author has suggested such a revision, along with more comprehensive and necessary reforms. *See* McElroy, *Proposals for Revisions to Texas Civil Statutes*, 44 TEX. B.J. 257, 257-58 (1981).

379. TEX. R. CIV. P. 40. Rule 40, in contradiction to article 1995, allows joinder of joint tortfeasors in a single suit. Joint tortfeasors are not necessary parties under subsection 29a. *See Leonard v. Abbott*, 366 S.W.2d 925 (Tex. 1963) (plea of privilege granted as to defendants who were not necessary parties).

380. TEX. R. CIV. P. 39-43.

suit (as stated in subdivision 4) should differ from joinder for venue purposes where none of the defendants reside in the county of suit (as in subdivision 29a).³⁸¹

*Article 1995(30): Special Venue*³⁸²

Subdivision 30 states that article 1995 will be displaced by any law expressly providing for venue in certain types of actions. Thus, when the legislature enacts a statute that contains a venue clause for disputes arising under it, that statute will preempt the general venue rule and the numerous venue exceptions articulated in article 1995.³⁸³ Although subdivision 30 is stated in mandatory terms, it does not convert a permissive venue provision in any other statute into a mandatory prescription. Permissive venue found in any other statute must always yield to a mandatory exception in article 1995.³⁸⁴ Subdivision 30 first appeared in the venue statute in 1879. It was apparently included by the early codifiers for uniformity purposes, since no specific act of the legislature can be found to substantiate the rationale behind its inclusion.³⁸⁵

*Article 1995(31): Breach of Warranty by Manufacturer*³⁸⁶

Subdivision 31 allows suits against manufacturers of consumer goods to be maintained in: (1) the county where the cause of action accrued; (2) any county where the manufacturer has an agency or representative; (3) the county where the manufacturer has its principal office; or (4) the county where the plaintiff resides. Subdivision 31 was added to the venue statute in 1973.³⁸⁷ It was designed to relieve the plaintiff's burden of proving a cause of action in a venue hearing against the defendant in complicated products liability suits.³⁸⁸ The venue facts the plaintiff must prove to sustain venue under subdivision 31 are that: (1) the suit is for breach of warranty; (2) the defendant is the manufacturer; (3) the product is a consumer good;³⁸⁹ and (4) the suit is brought in a county that fits the plaintiff's cho-

381. Langley, *supra* note 24, at 567-69.

382. TEX. REV. CIV. STAT. ANN. art. 1995(30) (Vernon 1964); see 1 R. McDONALD, *supra* note 63, § 4.37; B. McELROY, *supra* note 36, § 703; Keith, *supra* note 63, at J-35.

383. Langdeau v. Burke Inv. Co., 163 Tex. 526, 529, 358 S.W.2d 553, 555-56 (1962).

384. *Id.*

385. See Tex. Civ. Stat. art. 1198(23) (1879).

386. TEX. REV. CIV. STAT. ANN. art. 1995(31) (Vernon Supp. 1982); see 1 R. McDONALD, *supra* note 63, § 4.37.1; B. McELROY, *supra* note 36, § 703; Keith, *supra* note 63, at J-35 to -36.

387. 1973 Tex. Gen. Laws, ch. 213, § 2, at 490.

388. See General Motors Corp. v. Franks, 509 S.W.2d 945, 947 (Tex. Civ. App.—Beaumont 1974, writ *dism'd*).

389. Whether the action is for breach of warranty and whether the product is a "consumer good" will be determined by the plaintiff's petition. See General Motors Corp. v. Washington, 559 S.W.2d 425, 427-28 (Tex. Civ. App.—Texarkana 1977, no writ); Maintenance & Equip. Contractors v. John Deere Co., 554 S.W.2d 28, 30-31 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ *dism'd*). One court has held that subdivision 31 applies only to breach of warranty and not to strict liability in tort. Chavez v. Murrel's Welding Works, Inc., 585 S.W.2d 787, 788 (Tex. Civ. App.—San Antonio 1979, no writ).

sen alternative.³⁹⁰

Other provisions of the venue statute make this exception redundant. If the manufacturer is a corporation, then the first three venue choices provided by subdivision 31 are already addressed by subdivisions 23 and 27 regarding suits against corporations.³⁹¹ The fourth alternative, granting venue at the plaintiff's residence, is the broadest provision of this subdivision and is by far the most popular with plaintiffs.³⁹² These subdivisions stand in need of some linguistic tightening due to this duplication.³⁹³

II. TEXAS CIVIL VENUE PROCEDURE

Early Texas venue procedure employed the common law plea in abatement to challenge the venue chosen by the plaintiff.³⁹⁴ The burden was on the defendant to traverse or especially deny the facts of the plaintiff's allegations which purported to establish venue in the county where suit was filed. Additionally, the defendant was required to negate all exceptions upon which the plaintiff might rely in order to achieve his alleged venue.³⁹⁵ This position was initially endorsed by the Texas Supreme Court,³⁹⁶ but the court later held to the contrary:

The right to maintain a suit in a county other than that in which the statute fixes the venue must depend upon the existence of the fact or facts which constitute an exception to the statute, and not upon the mere averment of such fact or facts. Where . . . he [the defendant] pleads the privilege of being sued in the county of his domicile as provided by that statute, to defeat this plea and deprive him of that right, we think the facts relied on should be not only alleged but proved.³⁹⁷

Consequently, the later supreme court ruling forced the plaintiff not only to allege and prove the specific facts needed to activate a venue exception, but it also shed some doubt upon the practice of forcing the defendant to negate the elements of the plaintiff's venue exceptions. The view that the defendant's privilege to be sued in his home county was valuable provided the justification for requiring more of the plaintiff than mere allegations of venue. Moreover, the zeal to protect the rights of the defendant gave rise to a Texas venue procedure that in many cases requires two trials of a suit, one to sustain venue, the other on the merits.³⁹⁸

390. *Hall v. Ford Motor Co.*, 565 S.W.2d 592, 594 (Tex. Civ. App.—Corpus Christi 1978, no writ).

391. 1 R. McDONALD, *supra* note 63, § 4.37.1 (Supp. 1980); B. McELROY, *supra* note 36, § 704.

392. 1 R. McDONALD, *supra* note 63, § 4.37.1 (Supp. 1980); B. McELROY, *supra* note 36, § 704.

393. B. McELROY, *supra* note 36, § 704.

394. J. TOWNES, *supra* note 74, at 349.

395. *Stark v. Whitman*, 58 Tex. 375, 376 (1882); *Houston & Tex. Cent. R.R. v. Graves*, 50 Tex. 181, 201 (1878).

396. *Robertson v. Ephraim*, 18 Tex. 118, 124 (1856). This position was held to be the law as late as 1910 in *Witherspoon v. Duncan*, 131 S.W. 660, 661 (Tex. Civ. App. 1910, no writ).

397. *Hilliard v. Wilson*, 76 Tex. 180, 184, 13 S.W. 25, 26 (1890).

398. *See Compton v. Elliott*, 126 Tex. 232, 237, 88 S.W.2d 91, 95 (1935).

The requirement that the defendant negate all possible exceptions that the plaintiff might establish was considered to be a harsh burden on the defendant.³⁹⁹ Also, the early plea in abatement practice contained no transfer provision. Consequently, when a suit was abated for improper venue, it was immediately dismissed rather than transferred to the proper county of venue. This dismissal caused delay at best, and at worst, loss of the cause of action due to statutory limitations.⁴⁰⁰ The 1907 legislature passed the Plea of Privilege Act to combat these criticisms.⁴⁰¹ The 1907 Act provided for transfer of suits to the proper county of venue rather than immediate dismissal upon a finding of improper venue, and the defendant was no longer forced to negate every possible ground of venue outside his own county of residence.⁴⁰² In 1917 the legislature added the provision that the defendant's plea of privilege constituted prima facie proof of his right to a change of venue to the county of his residence, thus requiring that the plaintiff file a controverting affidavit to contest the defendant's plea.⁴⁰³ The 1917 Act also provided for an interlocutory appeal of the venue decision prior to the trial on the merits of the case.⁴⁰⁴ These important provisions of the 1907 and 1917 Acts were originally codified in articles 1832, 1833, and 1903 of the Texas statutes.⁴⁰⁵ They were subsequently renumbered as articles 2007 and 2008 in the statutory revisions of 1925.⁴⁰⁶ This was the state of the law when the first Texas Rules of Civil Procedure took effect in 1941.⁴⁰⁷

A. Current Procedure

Current Texas venue procedure is codified in the Texas Rules of Civil Procedure, rules 86-89 and 385(e),⁴⁰⁸ and has not changed substantially since 1941. Before consideration of the rules in detail, a brief outline of their procedural application is necessary.

When the plaintiff files a petition, the defendant may contest the choice of venue by filing a plea of privilege.⁴⁰⁹ The plaintiff must respond within

399. M.E. SHAFER, GAMMEL'S ANNOTATED RULES OF CIVIL PROCEDURE IN TEXAS app. xi (1948) ("Changes Made in Pleas of Privilege by New Rules," an address by Fred Porter, May 5, 1945).

400. *Id.*; see also J. TOWNES, *supra* note 74, at 350.

401. 1907 Tex. Gen. Laws, ch. 133, § 1, at 248.

402. *Id.*

403. 1917 Tex. Gen. Laws, ch. 176, § 1, at 388.

404. *Id.*

405. Tex. Rev. Civ. Stat. arts. 1832, 1833, 1903 (1918).

406. *Id.* arts. 2007, 2008 (1925).

407. Adopted by authority of the Rule Making Power Act, 1936 Tex. Gen. Laws, ch. 25, § 6, at 201.

408. TEX. R. CIV. P. 86-89, 385(e).

409. A defendant may waive a plea of privilege in any number of ways. For example, if the defendant fails to file the plea in "due order," that is, before any other plea, pleading, or motion is filed, the plea of privilege is waived. *Crosby v. Heldt Bros. Trucks*, 394 S.W.2d 235, 237 (Tex. Civ. App.—San Antonio 1965, no writ). The defendant also waives a plea of privilege by taking any action that would be considered inconsistent with his claim that the venue should be transferred. 1 R. McDONALD, *supra* note 63, § 4.40. Obviously, these waiver rules are traps for the unwary. Moreover, until the plea of privilege has been dis-

ten days⁴¹⁰ by filing a controverting plea, otherwise the defendant's plea of privilege will be granted, and the case will be transferred to the county of the defendant's residence.⁴¹¹ If a controverting plea is filed, the plaintiff is responsible for obtaining a hearing. At the hearing, the plaintiff is obligated to prove the specific venue facts associated with the subdivision of article 1995 upon which he relies to maintain venue in the county of suit. These venue facts must be proven by a preponderance of the evidence.⁴¹² If the plea is denied, then the trial on the merits of the case may begin. This is the case even if the defendant appeals the venue ruling of the trial court.⁴¹³ If the plea of privilege is sustained and the trial court orders that the case be transferred to the county of the defendant's domicile, then a timely appeal by the plaintiff will suspend the transfer and trial of the case pending the venue appeal.⁴¹⁴

B. Rule 86

Rule 86 of the Texas Rules of Civil Procedure contains the provisions regarding the defendant's plea of privilege. The rule provides that the plea must be sworn to and in writing. It must also state that the defendant was not, at the institution of the suit, at the time of service of process, or at the time of the filing of the plea of privilege, a resident of the county of suit.⁴¹⁵ The defendant must then name his county of residence and his address, and he must state that no exception to exclusive venue at his residence exists.

The plea of privilege is the exclusive method of raising the issue of venue in Texas courts.⁴¹⁶ Since the plea of privilege constitutes prima facie proof of the defendant's right to a change of venue from that alleged in the plaintiff's complaint,⁴¹⁷ the plaintiff has the burden of proving the facts

posed of, the trial court lacks jurisdiction to render a judgment on the merits against the defendant. *Jones v. Kline*, 451 S.W.2d 788, 789 (Tex. Civ. App.—Houston [1st Dist.] 1970, no writ).

410. TEX. R. CIV. P. 88. A controverting plea must be filed with the clerk of the court within 10 days of the receipt of the plea of privilege. An extension is theoretically available "for good cause," but making the required showing is difficult. *Lindsey v. Chanslor*, 538 S.W.2d 675, 677 (Tex. Civ. App.—Waco 1966, no writ). This ten-day filing requirement begins to run upon receipt of the plea and is not extended by the provisions of rule 21a, which allow an extra three days for responsive action when service is by mail. *Wilson v. Gross Nat'l Bank*, 535 S.W.2d 374, 376 (Tex. Civ. App.—Tyler 1976, no writ).

411. TEX. R. CIV. P. 385(e).

412. *Porter v. United Motels, Inc.*, 315 S.W.2d 340, 343 (Tex. Civ. App.—Waco 1958, no writ). The trial court should not, however, consider the matter of affirmative defenses at the venue hearing. *Berton Land Dev. Corp. v. Ryan Mortgage Investors*, 563 S.W.2d 811, 812 (Tex. 1978).

413. TEX. R. CIV. P. 385(e). As a practical matter, few plaintiffs' lawyers will venture to try the case on the merits since the venue order may ultimately be reversed on appeal. In that event, the entire trial would have been futile.

414. *Id.*

415. *Id.* If the defendant had been a resident of the county where suit was filed at the time suit was filed this would, of course, be dispositive of the issue.

416. *Texas Highway Dep't v. Jarrell*, 418 S.W.2d 486, 489 (Tex. 1967).

417. *Geary, Hamilton, Brice & Lewis v. Coastal Transp. Co.*, 399 S.W.2d 878, 879 (Tex. Civ. App.—Dallas 1966, no writ).

necessary to overrule the plea and obtain the desired exception.⁴¹⁸ In addition, the plaintiff must plead specifically in the controverting plea the grounds relied upon to confer venue in the county of suit.⁴¹⁹

C. Rule 87

The venue hearing itself is the subject of rule 87 of the Texas Rules of Civil Procedure. The rule provides that the hearing cannot be held until at least ten days have elapsed after the defendant has received a copy of the plaintiff's controverting plea.⁴²⁰ If the defendant demands a jury trial on the venue issue, the court may require the cause to be tried on the merits at the same time.⁴²¹ Consequently, few defense lawyers ever demand a jury trial on the venue issue.

The venue hearing differs from a trial on the merits in that the inquiry at the venue hearing is whether the defendant may be sued where the plaintiff has instituted suit. The trial on the merits determines whether the defendant is liable to the plaintiff on the transaction in question and what damages, if any, should be awarded because of that liability.⁴²² Proof at the venue hearing relates solely to the venue facts necessary to maintain venue as specified by the exception relied upon by the plaintiff.⁴²³ Depending upon the exception sought, however, issues at the venue hearing will often overlap with those litigated at the trial on the merits. The plaintiff has the burden of pleading and proving that his case is within one of the statutory exceptions to the general venue rule favoring the defendant's residence as the proper place of trial.⁴²⁴

D. Rule 88

Rule 88 of the Texas Rules of Civil Procedure concerns the issuance of process for witnesses and the taking of depositions for the purposes of the venue hearing. The rule specifies that such actions will not constitute a waiver of the plea of privilege. Additionally, the rule provides that deposi-

418. *Citizens Standard Life Ins. Co. v. Gilley*, 521 S.W.2d 354, 356 (Tex. Civ. App.—Dallas 1975, no writ); *Fleetwood Constr. Co. v. Western Steel Co.*, 510 S.W.2d 161, 163 (Tex. Civ. App.—Corpus Christi 1974, no writ).

419. *Flugarth v. Brickstone Prods. Corp.*, 411 S.W.2d 426, 427 (Tex. Civ. App.—Austin 1967, no writ).

420. The rule goes on to state that after the ten-day period the court "shall promptly hear such plea of privilege." As a practical matter the plea of privilege is rarely "promptly" heard. Usually so much discovery must be done on the matter that several years may elapse before the parties are prepared for a hearing. TEX. R. CIV. P. 87. This is especially true in light of the requirement for some of the venue exceptions that a cause of action must be proved by the plaintiff in the venue hearing.

421. *Alaniz v. Haegelin*, 384 S.W.2d 431, 433 (Tex. Civ. App.—Eastland 1964, no writ) (plaintiff entitled to jury on venue issue if some evidence of probative force to support alleged venue facts).

422. *Cunningham v. Portwood*, 426 S.W.2d 658, 661 (Tex. Civ. App.—Fort Worth 1968, no writ).

423. *Compton v. Elliott*, 126 Tex. 232, 237, 88 S.W.2d 91, 93 (1935).

424. *Banks v. Collins*, 152 Tex. 265, 267, 257 S.W.2d 97, 99 (1953); *Guerra v. Texas Employers Ins. Ass'n*, 480 S.W.2d 769, 772 (Tex. Civ. App.—Corpus Christi 1972, no writ).

tions taken in preparation for a venue hearing may be read into evidence in subsequent suits involving the same parties. Subsequent suits, however, must "[concern] the same subject-matter in like manner as if taken in such subsequent suit."⁴²⁵ Consequently, a deposition taken in preparation for a venue hearing that touches upon the merits of the cause of action will ordinarily be admissible into evidence at the trial upon the merits. This rule of procedure thus increases the importance of pre-venue hearing discovery and the venue hearing itself.

E. Rule 89

Rule 89 of the Texas Rules of Civil Procedure provides for disposition of the trial on the merits after the trial court has ruled on the plea of privilege. If the plea is sustained, the court must transfer the case to the proper county of venue along with a transcript of the hearing and all original papers filed with the court.⁴²⁶ The case is then subject to trial ten days after the transcript and papers are received by the transferee court. The transferring court must make a copy of the transcript and papers filed for all defendants who have been severed from one or more other defendants and also send these documents to the proper court. Consequently, the administrative burden that falls upon the transferring court in sustaining a plea of privilege is substantial, especially in a case dealing with multiple defendants.

F. Rule 385(e)

Texas Rule of Civil Procedure 385(e) provides for appeal of the venue decision. Rule 385(e) specifies that if the appeal is from an order sustaining the plea of privilege, then the transfer of the case and the trial on the merits will be suspended pending the appeal.⁴²⁷ In addition, article 2008 regarding the right to an interlocutory appeal remains in effect.⁴²⁸ Article 2008 is essentially the same as rule 385(e), except that it provides that either party may appeal the venue decision. Consequently, while rule 385(e) does not speak to the issue of who may file an appeal concerning a trial court's venue ruling, article 2008 provides that either party has the right to appeal their venue decision because it is an interlocutory appeal. Nevertheless, both rule 385(e) and article 2008 provide that only the appeal of the order sustaining the plea of privilege will suspend transfer and trial.

G. Criticism of the Venue Procedure

The most important criticism leveled against the Texas venue procedure is the excessive delay engendered before a suit is ready for a trial on the

425. TEX. R. CIV. P. 88.

426. *Id.* 89. The rule provides that "the cause shall not be dismissed." *Id.* Consequently, the decision to transfer is not optional; it is mandatory.

427. TEX. R. CIV. P. 385(e).

428. TEX. REV. CIV. STAT. ANN. art. 2008 (Vernon 1964).

merits of the claim.⁴²⁹ This consistent delay in the trial on the merits is evidenced by the number of reported venue cases that consume the time of attorneys, courts, and litigants on matters of mere procedure.⁴³⁰ In many cases, the plea of privilege process is employed to delay the trial on the merits and to obtain a preview of the plaintiff's case.⁴³¹

Texas venue practice not only delays the trial on the merits, but it also confers upon the defendant a strategic edge in negotiating settlements since the plaintiff is forced to incur additional expense before any possible recovery can be obtained.⁴³² This expense and delay is compounded if the plaintiff is required to appeal an adverse ruling prior to proceeding on the merits. Thus, in cases where the plaintiff has limited resources, the venue hearing may determine whether the plaintiff will be able to maintain his action as to the trial on the merits at all. In small damage cases the plaintiff may not find it profitable to travel to a distant county to prosecute his claim if the defendant's plea of privilege is sustained. In other cases, the mere assertion of a plea of privilege may dissuade the plaintiff from pursuing the action at all, thus granting the defendant an unfair bargaining lever as to disposition of the litigation.

Although the inquiry at the venue hearing differs from that of the trial, the venue hearing frequently becomes "a short form duplication of much of a subsequent trial on the merits."⁴³³ In most cases nothing is gained by requiring proof of the facts alleged in the controverting plea, because all the facts required in the controverting plea must be set out in the plea under oath.⁴³⁴ Thus the requirement of proof of the venue facts by a preponderance of the evidence accomplishes nothing save increased delay in reaching the trial on the merits of the controversy and a proportionate increase in expenses.

Finally, the Texas Rules of Civil Procedure cause confusion regarding the interlocutory appeal of a venue order. While provisions regarding the venue hearing, the plea of privilege, and the controverting plea are found in rules 86-89, the process of appeal for the venue decision is hidden in rule 385(e).⁴³⁵ In addition, article 2008⁴³⁶ with its overlapping clauses is still in effect with respect to the venue appeal, even though the Rules of Civil Procedure adopted in 1941 repealed most of the then existing statu-

429. See B. McELROY, *supra* note 36, § 679 n.70, at 445, where the author comments that most of the Texas venue problems are created by the venue hearing with its onerous proof requirements and the right of the plaintiff to appeal the venue decision.

430. *Id.* § 779, at 39.

431. Harvill, *supra* note 24, at 530 (citing Knapp, "Pleadings from Defendant's Viewpoint," § 3.33, Subchapter B, Chapter 3, *Personal Injury Litigation in Texas*). Use of the venue hearing as a discovery tool is unjustifiable. The rules provide liberal discovery procedures for the defendant to obtain a preview of the plaintiff's case, but not to delay the trial on the merits unduly.

432. Langlely, *supra* note 24, at 550-51.

433. B. McELROY, *supra* note 36, § 772, at 31.

434. *Id.*

435. Venue rules 86-89 fall under the categorical heading of "pleading," while venue appellate rule 385(e) falls under the categorical heading of "proceedings."

436. TEX. REV. CIV. STAT. ANN. art. 2008 (Vernon 1964).

tory rules of practice and procedure.⁴³⁷

III. THE VENUE SYSTEM IN OTHER STATES

The Texas venue process is the product of its Spanish civil law heritage and the large size of the state. States with similar characteristics, however, have not encumbered themselves with the same statutory venue complexities and the corresponding amount of conflicting case law as has Texas. A comparison of the venue practice in three other similar states reveals clues regarding the pathology of Texas venue practice. Alaska, California, and Arizona have been chosen for comparison. Alaska and California are similar in geographic size to Texas, while the venue practice in California and Arizona, like Texas, has developed from the Spanish civil law.

A. Alaska

The Alaska venue statute is admirably simple,⁴³⁸ thus differing markedly from the lengthy Texas statute. The Alaska venue statute provides that a civil action may be brought in the judicial district where the defendant may be served with process, or in the district where the claim arose.⁴³⁹ Real property suits provide the only exception to this basic rule; these suits must be commenced in the judicial district where the real property, or any part of the affected real property, is situated.⁴⁴⁰ The Alaska statute additionally contains a catch-all measure, which provides that actions in cases not covered by the provisions noted above may be brought in any judicial district of the state.⁴⁴¹ Furthermore, the Alaska Legislature has conferred upon state trial court judges great discretion to transfer cases if the convenience of witnesses and the ends of justice would be promoted,⁴⁴² or alternatively if the court finds that the defendant will be put to unnecessary expense and inconvenience by the disposition of suit in the venue of filing.⁴⁴³

By granting the plaintiffs an optional venue provision for most civil actions, Alaska has chosen to focus its attention on the place where the cause of action arose as the primary consideration in determining venue. Conceivably, a plaintiff could pursue a defendant to an inconvenient forum and have process served there as a harrassment technique, but judicial discretion serves as the safety valve in such situations. The Alaska provision permitting suit to be maintained in any county where the defendant can be served is also compatible with the Alaska incorporation statutes, which define the residence of the corporation and the persons who may be served as representative of the corporation.⁴⁴⁴ Various provisions of the Alaska

437. B. MCELROY, *supra* note 36, § 777, at 35.

438. ALASKA STAT. § 22.10.030 (1962).

439. *Id.* § 22.10.030(b).

440. *Id.* § 22.10.030(a).

441. *Id.* § 22.10.030(e).

442. *Id.* § 22.10.040(2).

443. *Id.* § 22.10.040(4).

444. *Id.* § 10.05.057.

statutes thus work in harmony to provide internally consistent results. Once again, abuse by the plaintiff can be cured by the trial court's discretionary change of venue procedure, and as a further deterrent against abuse the Alaska statutes provide that costs for venue procedures may be assessed against the plaintiff in appropriate circumstances.⁴⁴⁵ Suits against nonresident defendants are covered by the safety-net provision, allowing suit to be maintained in any judicial district. The Alaska statute contains no specific rule concerning joinder of parties or actions. It purposefully leaves these issues to the Rules of Civil Procedure.⁴⁴⁶

The procedure for calling the court's attention to improper venue is by way of pretrial motion.⁴⁴⁷ Failure to make timely objection to improper venue waives the objection.⁴⁴⁸ The decision to grant or deny a change of venue is solely within the discretion of the trial judge.⁴⁴⁹ As such, venue is not left unchecked in the hands of the plaintiff, nor is it so skewed towards protection of the defendant as to overburden the plaintiff. The judge will base this discretionary decision on affidavits that must state the statutory grounds relied upon for a requested change of venue.⁴⁵⁰ The procedure for appeal of the venue order is by appeal of the final judgment of the trial on the merits, and the appellant must demonstrate that the venue ruling constituted an abuse of discretion that resulted in prejudicial error.⁴⁵¹ Consequently, as the venue ruling cannot be brought up on interlocutory appeal, abuse by delay through a purely procedural mechanism is avoided.

B. California

The California venue statute⁴⁵² will appear more familiar to Texas lawyers than the Alaska statute since California shares with Texas the civil law preference for the defendant. The California venue law states: "(a) Except as otherwise provided by law . . . the county in which the defendants or some of them reside at the commencement of the action is the proper county for the trial of the action."⁴⁵³ While the California exceptions to the basic venue rule are not numbered or physically separated from the body of the general venue statute, the exceptions indicate California's concern over many areas similar to those manifested in the Texas exceptions. For example, California has exceptions to the general venue rule covering tort claims,⁴⁵⁴ contracts in general,⁴⁵⁵ consumer contracts,⁴⁵⁶

445. *Id.* § 22.10.040(4). Subdivision 4 provides that if the court finds that the expense and inconvenience were intentionally caused, then costs can be assessed against the plaintiff. *See* McClellan v. Kenai Peninsula Borough, 565 P.2d 175, 179 (Alaska 1977).

446. Compare the Texas practice where joinder for venue purposes is different from joinder of parties and issues. *See supra* notes 72-86 (subdivision 3), 87-100 (subdivision 4), 366-81 (subdivision 29a) and accompanying text.

447. ALASKA R. CIV. P. 12.

448. ALASKA STAT. § 22.10.030(f) (1962).

449. Maier v. City of Ketchikan, 403 P.2d 34, 39 (Alaska 1965).

450. Coughlan v. Coughlan, 423 P.2d 1010, 1015 (Alaska 1967).

451. *Id.* at 1014.

452. CAL. CIV. PROC. CODE § 395 (West Supp. 1982).

453. *Id.* § 395(a).

454. *Id.*

455. *Id.*

456. *Id.* § 395(b).

determination of rights to real property,⁴⁵⁷ liens or foreclosure actions on real property,⁴⁵⁸ and actions where the defendant is a nonresident,⁴⁵⁹ a corporation,⁴⁶⁰ or the executor of an estate.⁴⁶¹ Thus California, like Texas, has addressed many specific kinds of actions and types of defendants in its venue statute. While these categories have spawned considerable litigation,⁴⁶² California has not experienced the burdensome flood of venue litigation that Texas has. Although the California and Texas venue statutes are similar, California's good fortune is the result of the simplified procedural approach taken by the California courts in the venue decision.⁴⁶³

In California the venue issue is raised when the defendant files an affidavit to the plaintiff's allegation of venue and a notice of motion for an order transferring the action.⁴⁶⁴ The trial judge adjudicates the venue question based only on these affidavits and the plaintiff's opposing affidavits.⁴⁶⁵ Disputed issues of facts relevant to the venue determination are decided by the trial judge, and these decisions cannot be disturbed on appeal.⁴⁶⁶ In addition, the trial judge has the discretion to consider the convenience of witnesses and the ends of justice when arriving at a venue decision. The trial judge is vested with the authority to change venue⁴⁶⁷ or retain the case⁴⁶⁸ when these goals would be promoted.

In 1974 the California Legislature amended its statute to grant to the trial court the power to order payment of costs to the prevailing party regarding transfer of actions brought in an improper venue.⁴⁶⁹ Relevant factors for the court to consider in assessing costs include whether an offer to stipulate venue was reasonably made and rejected by either party and whether the plaintiff's selection of venue or the defendant's motion for transfer was made in good faith.⁴⁷⁰ Additionally, any costs assessed by the court are specifically made the personal liability of the attorney representing his client and are not chargeable to the party involved in the litiga-

457. *Id.* § 392(1)(a).

458. *Id.* § 392(1)(b).

459. *Id.* § 395(a).

460. *Id.* § 395.5.

461. *Id.* § 395.1.

462. For example, the annotations to CAL. CIV. PROC. CODE § 395 (West Supp. 1982), the basic California venue provision, take up 33 pages.

463. CAL. CIV. PROC. CODE § 396b (West Supp. 1982); *see also id.* § 397 (permitting discretion in venue transfers as well). In addition to this simplified procedural approach, another reason for California's lack of venue litigation is that the courts have not construed the statute to require the plaintiff to prove a cause of action in order to establish an exception to the basic venue rule favoring the defendant. Harvill, *supra* note 24, at 530.

464. CAL. CIV. PROC. CODE § 396b (West Supp. 1982).

465. *Id.*; *see also* Diepenbrock v. Auslen, 185 Cal. App. 2d 747, 8 Cal. Rptr. 659 (1960).

466. CAL. CIV. PROC. CODE § 397(3) (West 1973).

467. *Id.* § 396b.

468. Hamilton v. Superior Court, 37 Cal. App. 3d 418, 423, 112 Cal. Rptr. 450, 453-54 (1974).

469. CAL. CIV. PROC. CODE § 396b (West Supp. 1982).

470. *Id.*

tion.⁴⁷¹ The 1974 amendments also provided that the cause of action on the merits could not be prosecuted in any state court until the costs and fees assessed from any venue procedure were paid.⁴⁷² These sanctions were clearly designed to eliminate abuse of the venue procedure by attorneys seeking to delay a trial on the merits or seeking to harass the opposing party.

Actions regarding venue matters are not directly appealable in California. Mandamus is the proper remedy.⁴⁷³ The appellate court may stay all proceedings in the trial court, however, pending final judgment on the petition for writ of mandate.⁴⁷⁴ While this structure may subject the trial on the merits to some delay, the mechanism for delay lies in the hands of the objective appellate court and not the zealous advocate. Thus the potential for delay abuse is substantially diminished.

C. Arizona

The Arizona venue statute⁴⁷⁵ was originally adopted from the Texas statute⁴⁷⁶ and therefore bears a striking resemblance to the Texas venue structure. Based upon the general rule that venue is to lie in the defendant's domicile, the Arizona venue statute has nineteen exceptions shifting venue to the choice of the plaintiff.

Arizona like California, has developed a different venue procedure from Texas. The venue decision in Arizona is based solely upon the pleadings and affidavits filed by the parties.⁴⁷⁷ Arizona has reflected the Texas procedure, however, of requiring an evidentiary hearing in venue matters.⁴⁷⁸ In addition, Arizona judges possess the discretionary authority to order a change of venue when the convenience of witnesses and the ends of justice would be promoted.⁴⁷⁹ The appeal of a venue decision in Arizona is by special action,⁴⁸⁰ and the test on appeal is abuse of discretion. A special action will not automatically stay the trial court proceeding unless a stay is specifically ordered by the appellate court.⁴⁸¹ These interlocutory stays are subject to the same limitations as temporary restraining orders.⁴⁸² Arizona courts will not ordinarily reverse venue decisions for an abuse of discretion

471. *Id.*

472. *Id.* § 399.

473. *Id.* § 400 (West 1973); *see also* Hennigan v. Boren, 243 Cal. App. 2d 810, 52 Cal. Rptr. 748 (1966) (contesting denial of the motion to change venue); Laurel Crest, Inc. v. Superior Court, 235 Cal. App. 2d 69, 44 Cal. Rptr. 867 (1965) (contesting the granting of the motion to change venue).

474. CAL. CIV. PROC. CODE § 400 (West 1973).

475. ARIZ. REV. STAT. ANN. art. 12-501 (West 1982).

476. *See* historical note ARIZ. REV. STAT. ANN. art. 12-401 (West 1982).

477. *Id.* art. 12-406.

478. *Pride v. Superior Court*, 87 Ariz. 157, 348 P.2d 924, 927 (1960); *Turner v. Superior Court*, 3 Ariz. App. 414, 415 P.2d 129, 134 (1966).

479. ARIZ. REV. STAT. ANN. art. 12-406 (West 1982).

480. *Landry v. Superior Court*, 125 Ariz. 337, 609 P.2d 607, 608 (Ariz. Ct. App. 1980).

481. ARIZ. SUP. CT. R. 5.

482. *Id.*

unless the complaining party demonstrates clear prejudicial error.⁴⁸³

The simplified procedure for determining venue in Arizona avoids the delay found in the Texas practice while protecting the defendant's privilege to be sued in the county of his residence.⁴⁸⁴ The discretionary power of the trial judge acts as a check on the factors of fairness in defining the proper location of trial. The motive to delay the trial is also removed by limiting the availability of an interlocutory stay and by allowing the trial judge wide latitude in the venue decision. Likewise, the deferential appellate standard of abuse of discretion encourages trial judges to act as they think best without the impending threat of an appellate review standard that is fatal in fact.

D. Federal District Court Venue

Federal venue procedure for district courts varies considerably from the Texas venue practice.⁴⁸⁵ In federal venue procedure, when diversity of citizenship is not the basis of subject matter jurisdiction, the federal venue statute allows the plaintiff to choose the district of the defendant's residence or the district where the claim arose as the place of trial.⁴⁸⁶ The statute also provides for venue when the defendant is a corporation,⁴⁸⁷ an alien,⁴⁸⁸ or when the defendant is a United States government employee being sued for actions in his official capacity.⁴⁸⁹ These specifically named parties are the only ones included in the general venue statute, although other detailed situations are addressed in specific sections.⁴⁹⁰ No article of the federal district court venue statute deals with "local" actions, although such actions are expressly excluded from the sections concerning litigation with multiple defendants or property in more than one district.⁴⁹¹ Thus the multidistrict litigation section provides that transitory actions may be brought in any district where one defendant resides or where some part of the property in controversy is located.⁴⁹²

The federal district judge has the discretionary authority to transfer an action from one venue to another for the convenience of the parties or in the interests of justice;⁴⁹³ likewise, an action may be dismissed or transferred if it is brought in the wrong district.⁴⁹⁴ This varies from the Texas venue procedure in that a Texas court has no option but to transfer the

483. *Williams v. Garrett*, 4 Ariz. App. 7, 417 P.2d 378 (1966).

484. *Harvill*, *supra* note 24, at 530.

485. 28 U.S.C. § 1391 (1976).

486. *Id.* § 1391(b). The venue issue in diversity cases is unique because the federal statute specifies that either the defendant's or the plaintiff's residence may be a proper venue for the suit; this is in addition to the district where the claim arose. *Id.* § 1391(a).

487. *Id.* § 1391(c).

488. *Id.* § 1391(d).

489. *Id.* § 1391(e).

490. *See id.* §§ 1394-1403.

491. *Id.* § 1392.

492. *Id.*; *see* Wood, *Federal Venue: Locating the Place Where the Claim Arose*, 54 TEXAS L. REV. 392 (1976).

493. 28 U.S.C. § 1404(a) (1976).

494. *Id.* § 1406(a).

cause of action to the proper venue. Dismissal for improper venue is prohibited. The venue decision in the federal trial court is based on the pleadings and affidavits of the parties after the defendant files a motion raising the issue of improper venue.⁴⁹⁵ Unless special circumstances show a clear abuse of discretion by the trial judge, the appellate remedy for venue error in the federal system is an appeal from the final judgment on the merits.⁴⁹⁶ A venue decision made after the conscientious exercise of a federal trial judge's judgment has been ruled not to be a proper matter of mandamus proceedings in the federal courts.⁴⁹⁷

A comparison of the federal provisions with the laws of Alaska, California, and Arizona reveals similar venue concerns and procedures. Both Alaska and Arizona have based their rules of civil procedure on the federal model⁴⁹⁸ and their handling of venue appeals is similar to the federal procedure.⁴⁹⁹ By allowing suit to be maintained where the defendant may be served with process, Alaska has avoided problems of defining the place where a defendant resides. This decision by the Alaska Legislature relies heavily on the individual judgment of the trial judge to properly set the place of trial and to remedy abuses through discretionary transfers. Unlike Texas, Alaska has had a dearth of civil cases dealing with venue issues.⁵⁰⁰ Arizona and California, with venue statutes more complex than Alaska and with venue procedures allowing appeals by way of extraordinary writs, have experienced more venue litigation than Alaska.⁵⁰¹ Nevertheless, the volume of Texas cases dealing with venue far exceeds the volume of Arizona or California cases for similar time periods.⁵⁰²

Two conclusions can be drawn from a comparison of these venue provisions with the Texas provisions. First, simplifying the procedure for making the initial venue decision in the trial court and thus altering the nature of the venue appellate procedure will reduce the number of venue cases reaching the Texas appellate courts. All four jurisdictions considered above limit the proof of venue issues to affidavits of the parties and require no proof of the elements of the cause of action. The federal and Alaska venue systems allow no interlocutory appeals of venue matters, while Cali-

495. FED. R. CIV. P. 12(b).

496. *Banker's Life & Casualty Co. v. Holland*, 346 U.S. 379, 382 (1953).

497. *Comfort Equip. Co. v. Steckler*, 212 F.2d 371, 376-77 (7th Cir. 1954).

498. Compare the following rules of civil procedure: ALASKA R. CIV. PROC. 12(b); ARIZ. R. CIV. PROC. 12(b); FED. R. CIV. P. 12(b).

499. Alaska, like the federal courts, allows appeals of the venue decision only after a final order has been entered. ALASKA STAT. § 22.10.040 (1981); see *Maier v. City of Ketchikan*, 403 P.2d 34 (Alaska 1965). The Arizona courts, conversely, may stay an action in the trial court upon venue appeal, but only on a showing of cause similar to that required for a temporary restraining order. ARIZ. SUP. CT. R. 5. Thus, the availability of a stay of the trial court is limited.

500. Using 1979 as a sample year, according to this writer's count, Alaska courts heard only two civil appellate cases that mentioned venue, and neither of these cases considered the venue statute.

501. In 1979, according to this writer's count, California appellate courts considered eight cases mentioning venue matters, while Arizona heard six cases mentioning venue.

502. In 1979, according to this writer's count, Texas appellate courts considered eighty-four cases dealing with venue, all of which mentioned the Texas venue statute, article 1995.

ifornia and Arizona limit the scope of appeals to abuse of discretion; additionally, the availability of a stay of the trial court proceeding is restricted. These changes in the Texas system would undoubtedly have the salutary effect of reducing the number of venue contests at the trial court level.

The second conclusion that can be drawn from a comparison of venue statutes and procedures is that procedural reform plus simplification of the venue statute best achieves the goal of relegating the venue decision to its rightful place of secondary importance to the trial on the merits. The primary aim of venue hearings is, of course, to achieve the most economic expenditure of the litigants' and trial courts' time, energy, and expense. The relative paucity of appellate cases in these comparison states indicates that these states have been more successful than Texas in reducing the importance of venue in relation to the trial on the merits. All four of the comparison jurisdictions have conferred broad discretion upon judges to transfer or retain cases based upon venue considerations of justice and fairness. This discretionary power serves as a means of remedying venue abuses while limiting the delay caused by venue trials and appeals. If a similar system were incorporated into the Texas venue structure, the voluminous venue litigation imposed upon our courts and clients would likely cease, with the resulting effect of a more focused effort by all parties on the most important aspect of litigation, the trial on the merits.

IV. EVALUATION OF HOUSE BILL 771 (1975)⁵⁰³

House Bill 771, a revision of article 1995, was proposed in 1975 by the Committee on Administration of Justice of the State Bar of Texas.⁵⁰⁴ The legislature did not pass H.B. 771 in 1975, but the bill was reintroduced in the house in 1981 in the same form.⁵⁰⁵ Although the proposed statute failed to pass the legislature again in 1981, it represents an attempt to improve the present Texas venue statute. Unfortunately, the bill is little more than a recodification of present venue exceptions to article 1995. Although a broad reading of one provision in the proposed statute dealing with "Conduct of Defendant"⁵⁰⁶ should serve to simplify many venue proceedings, the proposed statute perpetuates much of the superfluous language and many of the inoperative subdivisions of article 1995 that have proven troublesome to Texas courts. The premise of the proposed statute is that a mitigation of the plaintiff's burden of proof at the venue hearings will remove the defendant's incentive to contest venue in order to delay the trial on the merits and increase his bargaining position.⁵⁰⁷ This mitigation in the burden of proof is the major revision found in the proposed statute, which repeatedly states that the plaintiff is not required to prove any of the

503. H.B. 771 (1975); *see infra* Appendix.

504. COMMITTEE ON THE ADMINISTRATION OF JUSTICE OF THE STATE BAR OF TEXAS, REPORT ON VENUE (1975).

505. H.B. 909 (1981).

506. H.B. 771, § 3(a) (1975).

507. This writer agrees with this general premise, but suggests that a more thorough revision of the statute and the venue procedure is needed.

issues concerning the merits of the case in order to maintain venue.⁵⁰⁸

The proposed statute is divided into four sections: section 1, definitions; section 2, mandatory venue; section 3, permissive venue; and section 4, general provisions. The definitions explicated in section 1 are a welcome addition because the present venue statute has generated volumes of litigation attempting to define the words used in the statute. Under the present statute, definitional problems have been exacerbated by the fact that some terms are held to have one meaning for venue purposes, and another meaning in a trial on the merits of the case.⁵⁰⁹ Although a definitions section should ameliorate these problems and make judicial application of the venue statute more predictable, the primary conundrum in the present statute is not the search for adequate definitions but the application of present definitions to ever varying factual situations.

The proposed statute's definitions section is not free of criticism. Section 1(a) of H.B. 771 provides a definition of the term "venue" to make clear the distinction between venue and jurisdiction. As stated in the proposed statute, venue is the authority to maintain a civil action in a particular county⁵¹⁰ while jurisdiction is the power of a court to sit in judgment in a particular matter.⁵¹¹ Jurisdictional provisions confer on a particular court "a power to hear and determine cases of a kind which the court could not otherwise hear."⁵¹² The importance of the distinction is that parties may waive objections to improper venue by not asserting them, while a court that lacks jurisdiction over a certain subject may not issue an enforceable judgment. Likewise, while the issue of venue can only be raised on appeal if properly preserved at the trial court hearing below, jurisdiction can be addressed at any time during appellate disposition of a controversy, including sua sponte by the judiciary. This definition of venue and distinction as to jurisdiction in the proposed statute is designed to immunize the venue statute from the specious jurisdictional arguments that have so plagued venue statutes in the past. While the proposed statute does not contain a provision for waiver of the right to make an objection to improper venue, the case law provides for waiver in the present Texas venue system.⁵¹³ If venue is to be statutorily defined, the possibility and mechanics of waiver should be included in the statute.

The definitions section of the proposed venue statute also establishes a distinction between mandatory and permissive venue.⁵¹⁴ This distinction is drawn because certain types of cases should be heard in only one venue, thus venue is mandatory; certain other types of cases could be heard in more than one proper venue, thus venue is permissive. Permissive venue

508. See H.B. 771, §§ 3(a)-(f) (1975).

509. See *supra* text accompanying notes 34-40.

510. H.B. 771, § 1(a) (1975).

511. Stevens, *supra* note 31, at 317.

512. *Id.* at 319.

513. *Livingston v. Gage*, 581 S.W.2d 187, 189 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.).

514. H.B. 771, §§ 1(b), (c) (1975).

allows the plaintiff a choice of proper forums. The mandatory and permissive categorization sets up a priority system for use when two or more venue provisions apply to the facts in a particular case and avoids conflict as to which provision should be applicable.⁵¹⁵ When a case must be transferred because of improper venue, the case will go to a mandatory venue county, if any, before being transferred to a county that is proper because of a permissive provision. If more than one permissive provision applies, the court will have discretion to decide the most convenient county for the parties and witnesses.⁵¹⁶

In many suits, more than one venue provision will apply.⁵¹⁷ Assuming that the majority of the overlapping venue provisions will be permissive, most suits requiring transfer under the proposed statute would be subject to judicial discretion in the choice of venue among qualifying counties. If judicial discretion, however, becomes the touchstone in such cases, why must the proposed statute go into such detail in listing so many permissive venue provisions? Time and interpretive effort would be saved by increasing the areas of judicial discretion and by paring down these provisions into a very few sections with broad scope. Courts could then exercise discretion in transferring cases for the convenience of the witnesses and to serve the ends of justice.

Section 1 of the proposed statute contains a needed subsection defining "residence" as it applies to various entities in the venue context.⁵¹⁸ This clarification of residence is juxtaposed with section 3(m) of the proposed statute. Section 3(m) provides that venue can be maintained in the county of the defendant's residence. The place of residence of the defendant therefore is an alternative venue in all the permissive venue provisions.⁵¹⁹ Subsection 1(d)(4) also defines in part the residence of an executor or guardian acting in his official capacity as the location of the court from which the executor or guardian derives his authority.⁵²⁰ What is gained by including this definition? The intent must have been to allow an executor to be sued in the county where the estate in controversy is administered, but this goal can be achieved through the use of other provisions, depending upon the nature of the claim. The executor definition appears to be a holdover from subdivision 6 of article 1995, which was drafted to protect the executor from having to defend against multiple suits filed in counties remote from the site of the estate's administration.⁵²¹ The proposed definition, however, effaces the favoritism presently shown to defendants and

515. *See, e.g., id.* § 4(b).

516. *Id.* § 4(f).

517. This statement is especially true given the breadth of the exception dealing with "Conduct of Defendant," which arguably could apply in all civil suits. *See* discussion *infra* note 543 and accompanying text.

518. H.B. 771, § 1 (1975).

519. *Id.* § 3(m).

520. *Id.* § 1(d)(4).

521. *See* discussion of TEX. REV. CIV. STAT. ANN. art. 1995(6) (Vernon 1964), *supra* notes 123-30 and accompanying text. A problem exists only when the executor or guardian resides in a county other than the county of administration.

complicates the proposed general definition of residence. Thus, the site of the administration of the estate evolves into but one more permissive venue choice. If providing that the executor be sued in the county of the estate's administration is so important, then a more straightforward approach of drafting a mandatory or permissive provision should be taken rather than fashioning an artificial definition of the residence of the executor.⁵²² Furthermore, little need exists for any special article dealing with suits against executors or guardians in their representative capacity. Suits against these fiduciaries should be subject to the same venue rules as suits against ordinary citizens.

Section 2 of the proposed statute contains the mandatory venue provisions.⁵²³ In the case law that has covered the current mandatory provisions, venue is proper in a single specified county; no option to the plaintiff is allowed. Section 2(a) of the proposed venue statute codifies a mandatory venue provision concerned with suits involving land.⁵²⁴ This subsection treats only suits to determine interests in land and eliminates the language of the existing statute that includes suits for damages to land.⁵²⁵ This is a beneficial revision and will limit the application of the subsection to suits where land title is the principal right asserted.

The remainder of section 2, however, deserves few compliments. In the provisions dealing with injunctions against suits⁵²⁶ and injunctions against executions⁵²⁷ the draftsmen of the proposed statute have ignored the confusion between these venue provisions and the language of article 4656 of the Texas Revised Civil Statutes.⁵²⁸ These provisions create a distinction between certain causes of action that has no rational basis in venue policy. Convenience of the litigants and witnesses and the location of evidence demand no such arbitrary distinction.

Sections 2(d) and 2(e) cover suits for mandamus against heads of state departments⁵²⁹ and suits against counties,⁵³⁰ respectively. These sections clearly favor the government-as-defendant over the plaintiff-as-citizen. The question to be asked is whether the government requires this kind of venue protection. Although the issue is a close one, this writer believes that the demands of administrative convenience justify the protection granted to counties in mandamus actions, but do not justify protection of mandamus actions against heads of state departments. Protection for the latter could be reinstated should abuses develop. It would seem more bur-

522. The artificiality of this definition is enhanced by the fact that the residence of the executor, administrator, guardian, or receiver is also defined as the county in which the conduct or activity of the ward or decedent occurred.

523. H.B. 771, § 2 (1975).

524. *Id.* § 2(a).

525. TEX. REV. CIV. STAT. ANN. art. 1995(14) (Vernon 1964).

526. H.B. 771, § 2(b) (1975).

527. *Id.* § 2(c).

528. TEX. REV. CIV. STAT. ANN. art. 4656 (Vernon 1952). The author suggests that article 4656 also needs revision to reflect proper venue considerations.

529. H.B. 771, § 2(d) (1975).

530. *Id.* § 2(e).

densome both in time and expense for a county or county official to litigate in the far corners of the state than for a state official to defend a rare mandamus action in a county other than Travis County.

Finally, the mandatory section of the proposed statute restricts the venue of a libel, slander, or invasion of privacy suit to the county where either the plaintiff or the defendant resides.⁵³¹ This measure mirrors the present exception to the general venue rule, which was enacted to prevent the plaintiff from choosing a remote venue for libel suits against a widely distributed publication.⁵³² Whether such a tactic would be used today is questionable. Moreover, protection for defendants from publication venue abuse may not be necessary. Clearly, a chosen venue that is remote from the parties and pertinent evidence would have little connection to any issue in a libel or slander case except as to the location of the defamatory publication. If the courts were empowered to consider the convenience of witnesses and the location of evidence in making a discretionary venue change, section 2(f) would be rendered superfluous. The trial court could simply move the venue to a county with a greater nexus to the witnesses and evidence. This of course assumes that the discretion of the trial judge would take precedence over a mandatory venue exception. But provisions like section 2(f), aimed at specific causes of action, parties, or situations, merely invite courts and lawyers to invent special circumstances to maintain venue in a forum foreign to the defendant's county of residence. For example, novel claims of invasion of privacy, which would be covered by proposed section 2(f), might be alleged in connection with other causes of action simply for the purposes of maintaining venue at the plaintiff's residence. Venue statutes should thus be drafted to the extent possible to avoid such subterfuges.

Section 3 of the proposed statute lists circumstances and causes of action in which permissive venue applies.⁵³³ The plaintiff may choose the venue provided in section 3(a) through (j)⁵³⁴ or 3(l),⁵³⁵ whichever fits the specific facts of the case, or the plaintiff may maintain suit in the county of the defendant's residence under section 3(m).⁵³⁶ The draftsmen of the proposed statute have performed an admirable job of condensing the existing statute into section 3. In doing so they have, however, preserved the venue law as it has developed under the existing statute and failed to remedy certain venue difficulties. A more thorough revision is needed to discourage unnecessary venue litigation. This revision could be accomplished by deleting all the specific types of actions listed in section 3, which provide for venue at a place where some element of a cause of action has arisen, and subsuming these specific types of actions into a single, broadly worded provision. Section 3(a) could serve this function of discouraging unneces-

531. *Id.* § 2(f).

532. TEX. REV. CIV. STAT. ANN. art. 1995(29) (Vernon 1964).

533. H.B. 771, § 3 (1975).

534. *Id.* §§ 3(a)-(j).

535. *Id.* § 3(l).

536. *Id.* § 3(m).

sary venue litigation if it were rewritten to include the county where a duty arose, a loss occurred, or where personal property is located. For example, in the proposed statute subsections 3(b) through 3(j) could be deleted since they provide that in certain situations venue may be maintained in the county where some element of the cause of action has accrued or some property is located. The only exception to this statement would cover a contract specifying performance in a particular county.⁵³⁷ In 1973 the Texas Legislature expressed the need to protect consumers from "distant forum abuse,"⁵³⁸ and subdivision 5(b) was added to article 1995. The proposed statute recreates subdivision 5(b) in proposed sections 3(b) and (e).

Other provisions in the permissive venue section of H.B. 771 concern suits in which the state is the plaintiff⁵³⁹ and suits in which the plaintiff's residence is considered to be the proper county for bringing suit.⁵⁴⁰ Administrative convenience may be a sufficient reason to justify special venue treatment for the state-as-plaintiff cases in the business-related situations specifically described in section 3(k). The suits described in section 3(k)(1), (2), and (3), however, could instead be included in a broad provision allowing suit where the legal duty arose or where the wrongful act or part of the act occurred. Since the business entities named throughout section 3 are required to register in Travis County for incorporation or authorization to transact business under Texas corporation laws, violation of some aspect of these procedures could be construed to occur in Travis County. Of course any witnesses or evidence will normally be located at the place where the corporation is doing business, usually the most reasonable place for holding the trial. Likewise, subsection 3(k)(4) of the proposed statute allows the state to force the defendant to shoulder a considerable burden of defending himself in Travis County from a charge of unlawfully doing business in the state when in most cases the evidence and witnesses will be located elsewhere.

Proposed subsection 3(l) subjects insurance companies to suit at the plaintiff's residence when the suit is based upon a contract of insurance.⁵⁴¹ In today's mobile society, favoring plaintiffs in this way may be desirable, but again such actions should be included under a provision that would establish venue in the county where a duty arose, a loss occurred, or where personal property is located. This subsection also perpetuates discrimination against insurance companies by refusing to treat other corporate entities in a like manner. No distinction between different types of corporations should be drawn.

Section 4 of the proposed statute contains general provisions dealing with joinder of claims and parties and transfer of cases. This writer views section 4 favorably.⁵⁴²

537. *Id.* § 3(b).

538. *See generally* Sampson, *supra* note 119.

539. H.B. 771, § 3(k) (1975).

540. *Id.* § 3(l).

541. *Id.*

542. *Id.* § 4.

Thus far, criticism of the proposed statute has focused on the individual provisions. The proposed statute can also be criticized for the complications it creates and its failure to achieve the true goal of a venue statute: providing a convenient place for trial. For example, an individual's action for a contested loss covered by a standard insurance contract might be subject to six different permissive provisions under section 3 of the proposed statute.⁵⁴³ Such a system is not only confusing for inexperienced plaintiff's counsel, but some of these provisions could easily be overlooked. The goal of this prolix system is to give plaintiffs wide latitude in maintaining venue against an insurance company, but this goal can best be satisfied by drafting a broad venue provision based on the place where the cause of action or part thereof arose, or where the loss occurred. Conversely, if the legislature decided that plaintiffs needed to be granted a choice of venue in their own county of residence, then subsection 3(*l*) would be an appropriate provision to achieve this goal. Of course, the defendant's residence should always be an appropriate permissive venue as is provided in the proposed statute at section 3(*m*). The other four venue provisions applicable to insurance contracts are nothing more than excess baggage.

Another complication in the proposed statute is that some subsections are already covered by other, broader subsections. For instance, most of subsections 3(*g*) as to the location of property, 3(*h*) as to writs of attachment, garnishment, sequestration, or execution, and 3(*i*) as to injunctions are already covered under subsections 3(*a*) through (*c*). No need exists for these superfluous subsections.

An even broader criticism of the proposed venue statute concerns the fact that not only can many of the specific subsections be subsumed into the general subsections, but the earmarking of specific types of actions for specific venue considerations can only produce more lawyers' wrangling over whether a petition sufficiently pleads a specific provision. The more lawyers dispute, the more expensive it becomes for their clients, and the more inefficient the judicial system becomes. Also, a court might even decide that the broader subsections are inapplicable because of the inclusion of specific actions, thus circumventing legislative intent in an attempt to unscramble the venue puzzle. The potential for venue disputes still abounds in the proposed statute.

As a result, any permissive venue provision designed to deal with a specific type of action can and should be covered by a broad provision placing venue where the wrongful act, omission, or loss occurred. In extraordinary situations, social policy may call for favoring plaintiffs,⁵⁴⁴ protecting defendants from distant forum abuse,⁵⁴⁵ or providing governmental entities

543. The six provisions are §§ 3(*a*) (conduct of defendant), 3(*e*) (performance by plaintiff), 3(*f*) (loss covered by insurance or indemnity), 3(*g*)(4) (location of property), 3(*l*) (plaintiff's residence), and 3(*m*) (defendant's residence).

544. For example, the proposed venue statute provides that the plaintiff's residence is made a permissive place of venue in suits against insurance companies. *Id.* § 3(*l*).

545. *See* TEX. REV. CIV. STAT. ANN. art. 1995(5)(b) (Vernon Supp. 1982).

with special venue choices.⁵⁴⁶ Such exceptions should be restricted to avoid unnecessary confusion and expense in deciding the proper place for trial. The issue is not complexity; it is simplicity and fairness.

V. A SUGGESTION FOR A NEW TEXAS VENUE STATUTE

One overriding principle should be considered in evaluating or drafting a venue statute. As venue is only a question of determining the fairest location to hold the trial on the merits, venue decisions should be based solely on the competing conveniences of the litigants, the witnesses, and the court.⁵⁴⁷ A number of general principles can be drawn from this basic premise. For example, convenience of the parties is the motive for venue provisions favoring the residence of one of the parties, while measures specifying that actions dealing with real property be commenced where the property is located favor the witnesses and courts. Provisions establishing venue where the activity the subject of the suit occurred favor the convenience of witnesses and the location of evidence. Thus, in considering the goal of convenience, four basic venue choices can be isolated:

- (1) where the subject of the action is situated;
- (2) where the wrongful act occurred, or duty arose, or loss occurred;
- (3) where the defendant resides;
- (4) where the plaintiff resides.⁵⁴⁸

A proper venue statute should consist of a general article founded on each of these choices. Ideally, these articles could be written broadly to contain few if any specific types of action,⁵⁴⁹ with legislative discretion to limit or expand the application of each provision in very special circumstances. For example, the plaintiff's residence could be expressly designated as a venue choice only when all defendants are nonresidents of the state.⁵⁵⁰ By limiting the use of specific legal terms and instead using broad language to effect venue rules, the legislature will reduce venue litigation by eliminating overlapping areas of potential conflict. For example, a plaintiff may allege negligence, but the defendant may contend that the cause is in fact an intentional tort or a contract action. Specific terms and causes of action encourage a plaintiff to allege as many causes of action as

546. Provisions granting the state or county the privilege of suing or being sued at the location of the seat of government are examples of social policy decisions that favor these governmental entities.

547. Stevens, *supra* note 31, at 331.

548. Stevens recognizes five basic venue factors: (1) where the subject of the action or part thereof is situated; (2) where the cause of action, or part thereof, arose; (3) where the defendant resides; (4) where the plaintiff resides; and (5) where the seat of government is located. Stevens, *supra* note 31, at 331-32. Stevens assimilates other factors into provisions dealing with the defendant's residence. For example, he combines the place where the defendant is doing business, or where the defendant has an office, agent, or representative, as an important subsection under the heading of the defendant's residence. *Id.* at 332. See also Guittard & Tyler, *supra* note 48, at 584, for an alternate listing of venue factors, including "(1) a connection between the suit and the county, and (2) a connection between the defendant and the suit."

549. Stevens, *supra* note 31, at 331.

550. See *id.* at 335 (illustrating a provision in this form).

possible, even though some may be specious or at best untenable, in order to establish venue at a more advantageous location. Thus, specific terms such as fraud, negligence, and trespass should be replaced by broader phrases describing the cause of action for venue purposes as a "wrongful act."

The new Texas venue statute proposed in this Article contains an initial section of definitions followed by five major parts. Since this proposed statute is based on the location of some act or omission in controversy, or the location of the alleged loss, or the residence of one of the parties, the definitions are limited to outlining the place of residence of the types of possible parties. The definitions section should take the following form:

- (a) The residence of a domiciliary is a permanent dwelling place within this State.
- (b) The residence of all corporations, domestic and foreign, shall be considered to be in any county in which the corporation:
 - (1) has a registered agent;
 - (2) has an office;
 - (3) has a place of doing business; or,
 - (4) is actually doing business.
- (c) The residence of partnerships, unincorporated associations, or nonresident persons doing business in the State shall be deemed to be the county in which they are actually doing business.

By broadly defining the residence of a corporation, the corporation will be subject to suit at the location where any business activity of the corporation occurs. Under part (c), partnerships, unincorporated associations, and nonresident persons may be sued in any county where they are actually doing business.

Part One would take the following form:

1. Mandatory venue. The trial of suits in the following actions shall be brought in the county specified:
 - (a) Suits for the recovery of real property, or of an estate or interest in real property, or for partition of real property, or the enforcement of mortgages or liens on real property, or to remove encumbrances from the title to real property, or to quiet title to real property must be maintained in the county where the real property or any part thereof is located.
 - (b) Actions against any county within the State must be brought in that county.
 - (c) Actions against any other political subdivision in the State must be brought in the county where the political subdivision or any part thereof is located.

Part One of the new venue statute sets venue where the subject of the action in controversy is located. This part includes suits for rights of ownership in land as well as measures that favor the seat of government as the best location for trial when the government becomes a defendant in litigation. These provisions are mandatory; no choice of alternative venue

would be possible if the subject of the suit were included in Part One. Social policy is the reason that these provisions are mandatory. Anglo-American jurisprudence has long held that the trial of interests in real property should be conducted in the county where the property is located. The obvious reason for this decision is that the greatest quantity and quality of the evidence relevant to land-based suits will be found in the county where the land is located. The convenience of the local governmental unit has been considered of sufficient importance to justify the requirement that venue in suits against the governmental unit itself, for example the county or city, be maintainable only in the county where that particular seat of government is located.

Although this Article is critical of subdivision 14 of article 1995 for its specificity,⁵⁵¹ maintaining specificity in part 1(a) of this proposed statute is desirable. In the context of a multiplicity of specific exceptions, as is the case with the current Texas venue statute, additional exceptions as set out in subdivision 14 generate unneeded confusion concerning the applicability of subdivision 14 versus other subdivisions. Also, this specificity produces additional procedural wrangling as lawyers try to shape their pleadings to fit within the terms of subdivision 14 and shop for the most advantageous venue. In the proposed statute, specificity is desirable because venue provision overlap would not be a major problem. The only potential overlap in this proposed statute would occur between the mandatory provision of Part One and the general permissive provisions. This overlap would not prove a catalyst for litigation, because the proposed venue statute specifically requires that mandatory provisions control over permissive provisions. Moreover, specificity is required in order to distinguish coverage of the mandatory provisions of this proposed statute from the permissive measures contained in Part Two.

Other specific types of actions, which for public policy reasons are required to be maintained in a particular county and no other could be included under Part One. These actions would be those deemed by the legislature to be of such importance that venue could not be maintained except in a specific location. Any actions included in Part One, however, should be specifically described to avoid confusion as to the applicability of Part One in conjunction with Parts Two through Five.

Part Two should take the following form:

2. Permissive venue.

The county in which the alleged wrongful act or omission, or part thereof, occurred, or in which the alleged duty arose, or in which any alleged loss, or part thereof, occurred as the result of an alleged wrongful act or omission, or where personal property is located, is a proper county for trial, except for actions included in Part 1.

The second part of the new venue statute contains a provision based on the place where the alleged wrongful act or omission occurred. This provision

551. TEX. REV. CIV. STAT. ANN. art. 1995(14) (Vernon 1964).

would allow for a nexus between the issues and evidence in the suit, and the place of trial.

The use of the term "wrongful act or omission" or "any loss, or a part thereof" in the proposed statute will cause fewer problems of interpretation than the phrase "cause of action" used in the current venue statute. Use of the former term will clarify the intent of Part Two: to provide for venue where the evidence and witnesses needed for proof of an issue will be located. At the same time, the problems of defining what is involved in a particular cause of action will be obviated.⁵⁵² The court need not consider, for example, whether a cause of action has been fully pleaded, or whether a particular allegation was actually part of a cause of action for purposes of establishing venue. Obviously, as only an allegation is required, the plaintiff need not prove that a wrongful act or omission or a loss has in fact occurred. The term "wrongful act or omission" therefore simplifies the venue decision for the trial judge and discourages plaintiff's counsel from framing his complaint around the venue structure.

This broad provision would also allow the plaintiff to bring the action in alternate locations. Some of these locations might not be, in a particular case, the most desirable venue choice given that convenience should be the foremost factor in any venue statute. As a balance to this provision, therefore, the defendant should have the right to move for a change of venue to a more convenient forum based on the availability of witnesses and evidence. The convenience of one of the parties, without more, should not ordinarily be the basis of a venue decision, since the court should not be asked to favor one party over another in contravention of the proposed statute. The court's primary consideration should be the convenience of witnesses and the location of evidence. An exception may occur when harassment by the plaintiff is apparent or when the burden on the defendant is excessive. The trial court's discretionary power to act on a motion of this type should be given deference, subject only to the strictest standards of appellate review in determining the existence of an abuse of judicial discretion. This discretionary change of venue based upon convenience of witnesses and availability of the evidence to be proven at the trial constitutes the primary operative portion of the new venue statute. It is located in Part Five.

Part Three should take the following form:

3. Permissive venue: Defendant's residence. The county of the defendant's residence is a proper county for trial, except for actions included in Part 1.

This provision would permit a defendant's home county to be an alternative venue in all suits not covered by the mandatory provisions of Part

552. For example, see the difficulty the federal courts have had in enunciating and applying a test for the district "in which the claim arose." 28 U.S.C. § 1391(a) (1976). One court has used the "weight of the contracts" test. *Philadelphia Hous. Auth. v. American Radiator & Standard Sanitary Corp.*, 291 F. Supp. 252, 260-61 (E.D. Pa. 1968). Another court has used the "place of injury" test. *Rosen v. Savant Instruments, Inc.*, 264 F. Supp. 232, 237 (E.D.N.Y. 1967).

One. The definition of "residence" given in the definitions section would provide for a broad venue choice when a corporation is the defendant. By allowing the defendant's residence to be an alternative venue site, the current venue statute's goal of protecting the defendant is partially served.

Part Four should take the following form:

4. Permissive venue: Plaintiff's residence. The county of the plaintiff's residence, or the residence of any one of several plaintiffs, is a proper county for trial if all of the defendants are nonresidents of this State, except for actions included in Part 1.

The fourth part of the new statute favors the plaintiff's residence as the venue choice when no defendant resides in the state. Although this situation may be rare, resident plaintiffs should be granted a forum for actions against nonresidents, provided that jurisdictional requirements can be satisfied. This provision is based on the convenience of the resident plaintiff, favoring state residents over nonresidents. Again, the defendant has a right to request a discretionary change of venue based upon the trial court's authority in Part Five.

The clauses suggested in section 4 of H.B. 771,⁵⁵³ which provide for joinder of parties or claims and transfer of cases, are satisfactory solutions to specific procedural problems and should be incorporated into the new statute's fifth part. Part Five should also address such procedural matters as the manner in which the issue of improper venue is raised, the manner in which venue evidence is presented, the trial court's discretion to change venue to a more convenient forum, and venue as established by contract.⁵⁵⁴

Part Five deals with general provisions applicable to the venue statute as a whole; it should take the following form:

5. General Provisions.

- (a) *Venue improperly laid*: The burden is on the defendant to place the issue of improper venue before the trial court by moving for a change of venue to a proper county. If such motion is made in a timely manner as may be prescribed in the Texas Rules of Civil Procedure, and the trial court determines that the case should be transferred, the trial court may then transfer the case. The trial court may also charge the plaintiff with reasonable costs incurred because of the venue hearing, including but not limited to reasonable compensation for defendant's expenses and reasonable attorney's fees. The defendant's failure to make a timely motion of improper venue shall be deemed to be a waiver of any objection to the venue.
- (b) *The venue decision*: In determining the proper venue for the trial of a civil action, the trial court shall consider only

553. H.B. 771, § 4 (1975).

554. The provisions of H.B. 771 dealing with the following subjects would be included in part 5 of the proposed statute: § 4a, assignment of note, etc.; § 4b, joinder of defendants; § 4c, joinder of claims; § 4d, counterclaims, cross-claims, third-party claims; § 4e, entire case transferred; § 4f, county to which transferred.

the factual sworn affidavits of the parties submitted in a timely manner as may be prescribed in the Texas Rules of Civil Procedure and the pleadings on file in the case. The trial court may, however, in its discretion, order an evidentiary hearing if the defendant contends that false facts have been alleged by the plaintiff for the purpose of maintaining venue in the forum county.

- (c) *Discretionary change of venue*: The trial court shall have discretion in all cases, except for actions included in Part 1, to order a change of venue upon motion timely filed by the defendant as may be prescribed in the Texas Rules of Civil Procedure. In exercising this discretion, the trial judge shall consider the convenience of the parties and the witnesses and whether the ends of justice would be promoted by the change.
- (d) *Change of venue by contract*: All contracts whereby venue as provided in this statute is altered, are invalid.
- (e) *Consumer transactions*: A suit by a creditor upon or by reason of an obligation arising out of a consumer transaction for goods, services, or loans, or extensions of credit intended primarily for personal, family, household, or agricultural use, is not a ground of venue in any county other than that in which defendant in fact signed the contract, or in the county where the defendant resides at the time of the commencement of the action.
- (f) *Other mandatory and permissive venue*: An action governed by any other Texas statute prescribing mandatory venue shall be brought in the county required by such statute. An action governed by any other Texas statute but providing for permissive venue may be brought in the county designated in such statute or in any county in which the action may be brought under the provisions of this statute.

Part Five of this proposed venue statute would be supplemented by amendments to the Texas Rules of Civil Procedure implementing the policies provided in the statute. For example, the legislature should not be concerned with the exact number of days allowed for the filing of the motion for change of venue, since this is an area of court procedure properly covered by the Rules of Civil Procedure. The legislature should instead address the broad policy issues and problem areas already discussed in this Article, such as the proof required to maintain venue, the trial court's discretion in ordering a change of venue, and the availability of an appeal of the venue decision. The following explication of the general provisions of the proposed statute suggests some appropriate amendments to the Texas Rules of Civil Procedure.

Part 5(a) of the proposed statute alters the existing plea of privilege structure, replacing it with the motion for change of venue. The Texas Rules of Civil Procedure should specify the proper time for filing the motion as well as the form and content of the motion. The goal of accelerat-

ing the disposition of the venue question would best be served by requiring that the defendant raise the venue issue within thirty days after filing an answer in the case. The parties should then be required to file affidavits of fact to assist the trial court in forming its decision. These affidavits should be filed within a set time period, for example twenty days from the defendant's motion for change of venue, subject to any continuance granted by the court. The trial judge could then dispose of the venue issue early in the proceedings, avoiding any substantial delay in preparing the case for trial.

Part 5(b) is designed to limit the evidence used by the court in forming the venue decision, particularly eliminating the need for an evidentiary hearing in all venue decisions. This provision will abolish the "two-trial" procedure that has historically plagued Texas venue practice. The affidavits to be submitted to the trial judge would be of the same factual nature as is required in summary judgment practice and would be sworn to by the party preparing them. This procedure would accelerate the venue decision while still protecting the rights of the parties.

Part 5(c) grants the trial court the discretion to consider the convenience of witnesses and the ends of justice in forming the venue decision, but only when the defendant raises these issues in the motion for change of venue. This provision would enable the trial court to transfer a case to a more appropriate county even though venue might be technically proper in the forum county. The trial court's discretion, however, cannot circumvent the mandatory provisions of Part One. Part 5(c) indicates the importance placed on the relationship between the availability of witnesses or the location of evidence and the proper place for the trial of a civil suit.

Part 5(d) prohibits the parties from contracting for the venue of any suit that arises out of the contract. Subdivision 5(a) of the present statute permits the parties to agree to venue when the suit is based on the contract. This subdivision was adopted to give the plaintiff a wider range of venue choices in light of the restrictive general rule of venue favoring the defendant. Under the proposed statute, plaintiff has no need of such relief since the plaintiff is given a wide range of venue choices and is not shackled by the general rule favoring the defendant. The primary reason for not permitting the parties to contract the venue is the plethora of adhesion contracts in modern life. If the parties were permitted to contract for venue, undoubtedly the party with the stronger bargaining position would require the venue of any suit to be in a county that would work to the disadvantage of the weaker party. For instance, one can imagine insurance companies requiring any suit brought against them to be brought at their home office in Dallas County. This would not only burden the plaintiff, in say Cameron County (Brownsville), but would in many cases not be the county with the closest nexus to the case in terms of the location of the evidence and convenience of the witnesses. Another instance of abuse could occur if sellers of products required any suits brought against them to be brought in a particular county. The sellers of products would undoubtedly choose a county the location of which would discourage a plain-

tiff from bringing a suit based upon economic loss, property damage, or personal injury. Statutory permission to contract for venue would result in further venue abuse. The best policy is not to allow a party with a strong bargaining position to force the weaker party into an inconvenient forum.⁵⁵⁵

Part 5(e) continues the present protection for consumers in suits by creditors concerning consumer transactions. The provision is designed to avoid distant forum abuse. Part 5(f) basically continues the present practice under subdivision 30 of article 1995. The primary purpose is to defer to venue provisions in other statutes.

With respect to appeals of the venue decision, this writer recommends the repeal of article 2008⁵⁵⁶ of the Texas Revised Civil Statutes and rule 385(e)⁵⁵⁷ of the Texas Rules of Civil Procedure, which allow an interlocutory appeal of trial court venue decisions. Interlocutory appeals have demonstrably increased the delay of trials on the merits and increased expenses of the litigants. Interlocutory appeals have also enhanced the defendant's incentive to contest venue in the first place. For these reasons the interlocutory appeal should be abolished. Any venue points of error should instead be presented in an appeal of the cause of action on the merits. The danger is, of course, that an appellate court will reverse solely because of some error in the venue, rendering the full-scale trial an exercise in futility. The benefits to be gained from the abolition of interlocutory venue appeal, however, would seem to far outweigh any such danger.

In advancing this proposed statute, this writer recognizes that the proposal may be criticized for relying too heavily on the discretion of local judges to adjust inequities and to restrain any abuse resulting from the increased freedom granted to plaintiffs in choosing venue. One might contend that judges would favor hometown plaintiffs over out-of-town defendants. This criticism is parried by the fact that if a judge is inclined to favoritism, he is going to exercise that favoritism no matter what the statute or rules may provide. Also, the alternative to increasing the discretion of the trial judges must be considered. Our present system vastly curtails the discretion of the trial judges by imposing rigid and detailed rules. We have already seen the vice inherent in such rules. Texas must either join with its sister states in reducing venue questions to a secondary role, or it can continue with the present restrictions upon discretion and keep the litigation pot boiling. Furthermore, the majority of the jurisdictions surveyed in this Article vest a similar amount of discretion in their trial judges. None of those jurisdictions has had the venue problems that Texas has had. If a plaintiff were to attempt to employ the broad power granted

555. An alternative might be to allow the parties to contract for any venue site that bears a reasonable nexus to the suit. This provision would have to be supplemented by a further provision that the trial judge has the discretion to transfer the case to a more convenient forum, specifically taking into account the unequal bargaining strength of the parties.

556. TEX. REV. CIV. STAT. ANN. art. 2008 (Vernon 1964); *see supra* notes 427-37 and accompanying text.

557. TEX. R. CIV. P. 385(e); *see supra* notes 408-14, 427-37 and accompanying text.

under Part Two to lodge the venue in an improper forum, the defendant could contest the improper venue on the ground that Part Two requires that *some* part of the subject matter of the suit be related to the forum county. If plaintiff's counsel alleges false facts in order to establish venue in an improper forum, then the defendant would have the right, and the burden of proof, to demonstrate the spurious nature of the plaintiff's allegations through the affidavit practice. The trial court should probably be given the authority to conduct an evidentiary hearing as it deems necessary. If, however, experience with the suggested system proves to be unsatisfactory in not sufficiently restraining overreaching by plaintiffs' attorneys, then sanctions against attorneys for abuse of the system could be instituted as a control measure.⁵⁵⁸

When the ease of modern travel and communication is considered, the plaintiff's choice of venue should be given preference over that of the defendant. This writer contends that such a system will remove the present inequities from the Texas venue practice and put the issue of venue in its proper place as a secondary, pretrial matter. More particularly, this proposed statute satisfies the factors with which a venue statute should be concerned. This proposed statute focuses upon the convenience of the parties, the witnesses, and the court, as well as the location of the evidence. "[T]he goal of the statutory venue system should be to consume as little judicial time as is consistent with overall fairness to all the parties to the lawsuit."⁵⁵⁹ The proposed statute satisfies this goal.

558. See CAL. CIV. PROC. CODE § 396b (West Supp. 1982).

559. Comment, *Federal Venue: Locating the Place Where the Claim Arose*, 54 TEXAS L. REV. 392, 392 (1976).

APPENDIX

By: Powers, Geiger, Maloney H.B. No. 771
A BILL TO BE ENTITLED
AN ACT

relating to venue in civil actions; amending Article 1995, Revised Civil Statutes of Texas, 1925, as amended; and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

Section 1. Article 1995, Revised Civil Statutes of Texas, 1925, as amended, is amended to read as follows:

"Article 1995. VENUE, GENERAL RULE

"Section 1. Definitions. (a) 'Venue' is the authority conferred by this article or by any other provision of law to maintain a civil action in a particular county.

"(b) Where provision is made that an action 'shall' be brought or maintained in a particular county, venue in the county specified is mandatory in the sense that transfer of the action to that county is required if a party makes proper objection to trial in any other county.

"(c) Where provision is made that an action 'may' be brought or maintained in a particular county, venue in that county is permissive in the sense that an action pending in that county is not subject to transfer to any other county unless a mandatory provision applies.

"(d) In this article, 'Residence' means:

"(1) a place where a natural person has a dwelling which he occupies other than occasionally or temporarily and is not limited to one residence;

"(2) a place where a natural person regularly works or maintains his principal place of business;

"(3) the principal place of business in this state of a public or private corporation, association, joint stock company, or partnership, domestic or foreign, or the registered office in this state designated by the corporation, association, joint stock company, or partnership in its articles of incorporation or other papers filed with the secretary of state; or

"(4) in an action involving an executor, administrator, guardian, or receiver in his official or representative capacity, the location of the court from which he derives his authority or the county in which the conduct or activity of the ward or decedent of the executor, administrator, guardian, or receiver occurred pursuant to Section 3 of this Act.¹

"Section 2. Mandatory venue. (a) Lands. Actions for recovery of real property or an estate or interest in real property, or for partition of real property, or to remove encumbrances from the title to real property, or to

1. The last part of this subsection after "or" was added by amendment in the House. The apparent intent was to permit a personal representative to be sued in other counties under § 3, but that result would follow without this amendment since the only function of this subsection is to define "residence." The amendment is inappropriate to the definition.

quiet title to real property shall be brought in the county in which the property or a part of the property is located.

“(b) *Injunctions against suits.* Actions to stay proceedings in a suit shall be brought in the county in which the suit is pending.

“(c) *Injunctions against executions.* Actions to restrain execution of a judgment based on invalidity of the judgment or the writ shall be brought in the county in which the judgment was rendered.

“(d) *Against state or² head of state department.* An action for mandamus against the head of a department of the state government shall be brought in Travis County.

“(e) *Against county.* An action against a county shall be brought in that county.

“(f) *Libel, slander, and invasion of privacy.* An action for libel, slander, or invasion of privacy shall be brought in the county of plaintiff’s residence or in the county of defendant’s residence.

“(g) *Other mandatory venue.* An action governed by any other statute prescribing mandatory venue shall be brought in the county required by such statute.

“*Section 3. Permissive venue. (a) Conduct of defendant.* An action may be maintained in the county in which there occurred any conduct or activity, including any act or omission in connection therewith, of defendant, his agent or employee, alleged in the petition as a basis of the action to be wrongful, negligent, or a breach of duty imposed by contract, statute, or common law.³ Plaintiff is not required to prove that the conduct or activity was wrongful or actionable or that the agent or employee alleged in the petition to have acted within the scope of his authority or employment by defendant did, in fact, act within the scope of his authority or employment, but only that the conduct or activity occurred in the county of suit and was the conduct or activity of defendant or of his agent or employee.

“(b) *Breach of duty.* Subject to the limitations specified in this subsection, an action may be maintained in the county in which defendant was required to perform a duty by contract, statute, or common law, if plaintiff alleges a breach of the duty by defendant as a basis of the action. Plaintiff is not required to prove the breach, but only the facts establishing a duty of defendant performable in the county of suit rather than elsewhere.

“Failure of defendant to pay money or to deliver personal property in a particular county is not a ground of venue unless the duty to do so is evidenced by a contract in writing expressly naming the county or a definite place in the county.

“Also, failure of defendant to pay money due on an obligation arising out of a consumer transaction for goods, services, loans, or extensions of

2. The “state or” should be eliminated. *See* TEX. REV. CIV. STAT. ANN. art. 1995, § 20 (Vernon 1964).

3. To bring product liability cases expressly within this subsection, the following words may be added at this point: “including manufacture, sale or delivery of a product alleged, as a basis of the action to have been defective.” This would complement § 3(c).

credit intended primarily for personal, family, household, or agricultural use is not a ground of venue in any county other than that in which defendant in fact signed the contract, notwithstanding any provision requiring payment at some other place.

"(c) *Injury or damage in county.* An action for injury or damages alleged by plaintiff as a basis for the action to have been caused by consumption, use, or operation of or contact with a product, object, or physical condition made, built, created, operated, sold, or supplied by defendant, either as principal or as agent for another, may be maintained in the county in which the consumption, use, operation, or contact occurred. Plaintiff is not required to prove injury, damage, causation, or liability, but only that the consumption, use, operation, or contact occurred in the county and that defendant, either as principal or as agent for another, made, built, created, operated, sold, or supplied the product, object, or condition alleged to have caused the injury or damage.

"(d) *Statement or representation.* An action, other than for libel or slander, may be maintained in the county in which defendant or his agent or employee, whether or not acting within the scope of his authority or employment, made a statement or representation alleged by plaintiff as a basis of the action to be false, fraudulent, or otherwise damaging to plaintiff. If the statement or representation was initially heard or received in a county other than that in which it was uttered or written, it is deemed to have been made in both counties. Plaintiff is not required to prove that the statement or representation was false, fraudulent, or material, or that plaintiff was injured in reliance on it, or that defendant's agent or employee made it in the scope of his authority or employment, but only that defendant or his agent or employee made such a statement or representation in the county.

"(e) *Performance by plaintiff.* An action on a written⁴ contract may be maintained in the county⁵ in which plaintiff or his assignor performed the acts which he alleges entitle him to demand performance by defendant or to damages for defendant's failure to perform. However, in any action arising out of a consumer transaction for goods, services, loans, or extensions of credit intended primarily for defendant's personal, family, household, or agricultural use, performance by plaintiff is not a ground of venue in any county other than that in which defendant in fact signed a contract evidencing the transaction. Plaintiff is not required to prove breach of a contractual duty by defendant, but only that plaintiff or his assignor rendered the performance under a contract between defendant and plaintiff or his assignor and has performed in that county acts which plaintiff alleges entitled him to performance by defendant.

4. The Committee on Administration of Justice recommended that this subsection apply to plaintiff's performance under "a contract express or implied," but the House limited it to performance under "a written contract."

5. This subsection might be considered too broad as applied to a case in which the plaintiff's performance under the contract extended to a large number of counties. To avoid this result, the word "principal" may be inserted before "county."

“(f) *Loss covered by insurance or indemnity.* An action on a contract of insurance or indemnity may be brought in the county in which there occurred the loss, casualty, or event which plaintiff alleges to be covered by the contract. Plaintiff is not required to establish defendant’s liability or that the loss, casualty, or event was in fact covered by the contract, but only that the loss, casualty, or event occurred in the county and that defendant issued or signed the contract which plaintiff alleges to cover the loss, casualty or event. A judgment against the insured or indemnitee or a payment by the insured or indemnitee for which reimbursement is claimed is considered a loss occurring in the county where the judgment was recovered or the payment was made.

“(g) *Location of property.* The following actions may be maintained in the county in which the property or a part of the property was located at the time of commencement of the suit or at the time of the damage or loss for which recovery is sought:

“(1) an action for damages to real property or to restrain interference with the use and enjoyment of real property;

“(2) an action to enforce a contract, security interest, or lien concerning real or personal property;

“(3) an action for recovery of specific personal property; or

“(4) an action on an insurance contract for loss of or damage to real or personal property.

“(h) *Writs.* An action for damages alleged to have resulted from issuance or levy of a writ of attachment, garnishment, sequestration, or execution may be maintained in the county in which the writ was issued.

“(i) *Injunctions.* An action for injunction restraining acts alleged to be occurring or threatened in a particular county may be maintained in the county in which the acts are occurring or are threatened.

“(j) *Mandamus and mandatory injunctions.* An action for mandamus or mandatory injunction to require an act to be done in a particular county may be maintained in the county where the act is specifically required to be done by contract, statute, or common law.

“(k) *Suits by state.* The state may maintain actions in Travis County to:

“(1) forfeit the charter of a private corporation;

“(2) cancel the permit authorizing a foreign corporation to transact business in this state;

“(3) restrain a corporation from exercising powers not conferred on it by the laws of this state; or

“(4) prevent a person from engaging in business in this state contrary to the laws of this state.

“(l) *Plaintiff’s residence.* The following actions may be maintained in the county of plaintiff’s residence at commencement of the action:

“(1) an action by an insured or beneficiary on a contract of life, health, accident, or liability insurance; or

"(2) an action on a contract of insurance for loss of personal property.

"(m) *Defendant's residence.* An action not governed by Section 2 of this article may be maintained in the county of defendant's residence, but one defendant's residence shall not establish venue of an action against any other defendant who seeks transfer of the action on grounds other than his residence in a different county.

"(n) *Other permissive venue.* An action governed by another statute providing the county in which the action may be brought, but not prescribing mandatory venue, may be brought in the county designated in such statute or in any county in which the action may be brought under the provisions of this article.

"Section 4. *General provisions (a) Assignment of note, etc.* The transfer or assignment of a note, account, or chose in action shall not entitle the holder or assignee to venue in a county which would not have been proper venue if no transfer or assignment has been made.

"(b) *Joinder of defendants.* When two or more parties are joined as defendants in the same action, and the court has venue of the action against any defendant, the court also has venue of the action against all defendants who are properly joined under the Texas Rules of Civil Procedure, except that residence of one or more defendants in the county of suit shall not establish venue of a defendant who seeks transfer of the action on a ground other than residence in a different county.

"(c) *Joinder of claims.* When two or more claims or causes of action are properly joined in one action under the Texas Rules of Civil Procedure, a court having venue of one claim or cause of action has venue of all claims or causes of action so joined unless one or more of the claims or causes of action is governed by a mandatory venue provision requiring transfer to another county under Section 2 of this article.

"(d) *Counterclaims, cross-claims, and third-party claims.* Venue of the main action shall establish venue of a counterclaim, cross-claim, or third-party claim properly joined under the Texas Rules of Civil Procedure, unless a severance is granted on other grounds.

"(e) *Entire cause transferred.* When venue is successfully challenged, the entire suit with respect to all parties shall be transferred to the county of proper venue unless a severance is granted on other grounds.

"(f) *County to which transferred.* If the cause must be transferred and a claim or cause of action involved in the action is governed by a mandatory venue provision under Section 2 of this article or under any other provision of law, the court shall transfer the entire action to the county in which venue is mandatory. If more than one county has mandatory venue, or if no mandatory provision is applicable and venue is permissive in more than one county, the court shall select a county of proper venue to which the cause shall be transferred, considering the convenience of the parties and the witnesses.

Section 5. Effective date. This Act is effective as of January 1, 1976, and shall apply to all suits filed after that date.”

Section 2. Emergency. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted.

